

— IN THE —

United States Circuit Court of Appeals for the Ninth Judicial Circuit

FEBRUARY TERM 1917

LUMBERMEN'S TRUST COMPANY,
Trustee, *Appellant,*

— vs. —

TITLE INSURANCE & INVESTMENT
COMPANY OF TACOMA, a corpo-
ration, COMMONWEALTH TITLE
TRUST COMPANY, a corporation,
HORACE FOGG, FRED S. FOGG,
HERBERT GOVE and ALVA FOGG,
administratrix of the estate of Frank-
lin Fogg, deceased, *Appellees.*

No. 54 E.

Statement of
Agreed Case
Under Rule 77

TRANSCRIPT OF RECORD

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF THE STATE OF WASHINGTON.

FRANK H. KELLEY, JOHN H. HALL,
ROBERT M. DAVIS, FRANK C. NEAL,

For Appellants.

CHARLES O. BATES,
CHARLES T. PETERSON,

For Appellees.

Filed
JUN 22 1917

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Trustee,

Appellant,

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TITLE INSURANCE & INVESTMENT
COMPANY OF TACOMA, a corpo-
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TRUST COMPANY, a corporation,
HORACE FOGG, FRED S. FOGG,
HERBERT GOVE and ALVA FOGG,
administratrix of the estate of Frank-
lin Fogg, deceased,

Appellees.

No. 54 E.

Statement of
Agreed Case
Under Rule 77

TRANSCRIPT OF RECORD

It is stipulated and agreed by the parties hereto that the following statement of the case shall supersede for all the purposes of the appeal all parts of the record; and shall be considered by the Appellate Court as the record on appeal, as provided by Rule 77, of the rules and practice of courts of equity in the United States. It is further stipulated that in printing the record captions, titles, verifications and all such other unnecessary parts as may be agreed upon may be omitted.

Dated, Tacoma, Washington, March 13th, A.D. 1917.

FRANK H. KELLEY, JOHN H. HALL,
ROBERT M. DAVIS, FRANK C. NEAL,

For Appellants.

CHARLES O. BATES,
CHARLES T. PETERSON,

For Appellees.

STATEMENT OF THE CASE.

On the 8th day of February, 1916, the appellant filed its original bill of complaint in the court below, which bill was afterward amended and which amended bill was as follows:

AMENDED BILL OF COMPLAINT.

Lumbermen's Trust Company, a corporation duly organized and existing under the laws of the State of Oregon, having its principal place of business at Portland, Multnomah County therein, and a citizen of said state, brings this its bill of complaint against the Title Insurance & Investment Company of Tacoma, a corporation duly organized and existing under the laws of the State of Washington, having its principal place of business at Tacoma, Pierce County therein, and a citizen of said state; Commonwealth Title Trust Company, a corporation organized and existing under the laws of the State of Washington, having its principal place of business at Tacoma, Pierce County therein, and a citizen of said State; Horace Fogg, a citizen of the State of Washington residing in Tacoma, Pierce County, in said state; Franklin Fogg, a citizen of the State of Washington residing in Tacoma, Pierce County, in said state; Fred S. Fogg, a citizen of the State of Washington residing at Tacoma, Pierce County, in said state, and Herbert H. Gove, a citizen of the State of Washington residing in Tacoma, Pierce County, in said state, and for cause of complaint against said defendants, and each of them, avers:

I.

The plaintiff, Lumbermen's Trust Company, is a corporation duly organized and existing under the laws of the State of Oregon, having a principal place of business in Portland, Multnomah County therein, and is a citizen of the said state, and is authorized and empowered by its charter and articles of association to act as a trustee. The said plaintiff corporation, by re-organization and change of name, is the successor to and endowed with all the rights and powers and responsibilities of the Lumbermen's Trust and Savings Bank, a corporation organized and existing under the laws of the State of Oregon, having its principal place of business in Portland, Multnomah County therein, and a citizen of said state.

II.

The defendant Title Insurance & Investment Company of Tacoma, is a corporation organized and existing under the laws of the State of Washington, having a principal place of business at Tacoma, Pierce County therein, and is a citizen of said state, and is authorized by its articles of association to engage in the manufacture and sale of all kinds of abstracts of title of real estate, abstract books and other records of the transfer of title of real estate, and to engage in the purchase and sale thereof, and generally to transact any and all business incident thereto. Plaintiff is informed and believes, and so alleges on information and belief, that all of the capital stock of the said defendant Title Insurance & Investment Company of Tacoma is owned by defendant Commonwealth Title Trust Company.

III.

The defendant Commonwealth Title Trust Company is a corporation organized and existing under the laws of the State of Washington, having a principal place of business at Tacoma, Pierce County therein, and is a citizen of said state, and is authorized by its articles of association to acquire the good will, rights, properties and assets of all kinds of any person, firm or corporation dealing in abstracts of title or owning an abstract of title plant, and to acquire any and all abstract books, files, records, and all property and matters pertaining thereto.

IV.

The defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, each of them, is a citizen of the State of Washington, residing at Tacoma, Pierce County in said state, and at the time hereinafter mentioned in this complaint, were the sole and only owners of the capital stock of defendant Commonwealth Title Trust Company.

V.

On or about the 2nd day of December, 1911, defendant Title Insurance & Investment Company of Tacoma, for a valuable consideration, made, executed and delivered to the Traders Trust Company of Oregon, a corporation duly organized and existing under the laws of the State of Oregon, having a principal place of business at Portland, Multnomah County therein, and a citizen of said state, its certain promissory notes in the aggregate sum of eighty thousand (\$80,000.00) dollars, said notes being thirty-two (32) in number, each of said notes being for the principal sum of twenty-five hundred

(\$2500.00) dollars, each of said notes bearing interest at five (5) per cent per annum, payable semi-annually on the 7th day of December and the 7th day of June of each year, and maturing as follows, to-wit: The first note maturing on the 7th day of December, 1915, and one note maturing on the 7th day of December of each year thereafter. As part of the said transaction, said defendant Title Insurance & Investment Company of Tacoma made, executed and delivered an agreement in writing of mortgage and pledge of certain personal property set forth and identified therein to the said Traders Trust Company of Oregon, a copy of which agreement is hereto annexed and hereby made a part hereof and marked Exhibit "A."

VI.

On or about the 2nd day of December, 1911, the defendants Commonwealth Title Trust Company, a corporation, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove made, executed and delivered to the said Traders Trust Company of Oregon an instrument of guarantee in writing, whereby the said defendant corporation, Commonwealth Title Trust Company, did guarantee the payment of the first seven (7) of the notes made, executed and delivered by the Title Insurance & Investment Company of Tacoma, as hereinbefore alleged and set forth, in accordance with the terms and conditions of said notes; and further guaranteed the payment of the interest down to and including the interest maturing December 7, 1921, of each and all of the thirty-two (32) notes, in accordance with the terms thereof, made, executed and delivered by the Title Insurance &

Investment Company of Tacoma to the Traders Trust Company of Oregon, as hereinbefore alleged and set forth. A copy of said guarantee in writing is hereto attached and hereby made a part hereof and marked Exhibit "B."

VII.

On or about the 2nd day of December, 1911, the defendant Commonwealth Title Trust Company made, executed and delivered to the Traders Trust Company of Oregon aforesaid its deed of mortgage of certain real property, and the improvements thereon, lying and being in the City of Tacoma, County of Pierce and State of Washington, and conditioned to secure the payment of the interest as it matures on thirty-two (32) certain promissory notes of twenty-five hundred (\$2500.00) dollars each, made by the Title Insurance & Investment Company of Tacoma to the Traders Trust Company of Oregon, dated December 11, 1911, and bearing interest at five (5) per cent per annum, payable semi-annually, down to and including the interest maturing on December 7, 1921, and to secure the principal of the first seven (7) of the said notes, the first of said notes maturing upon December 7, 1915, and one on December 7th of each year thereafter down to and including the year 1921. A copy of said deed of mortgage hereto is attached and hereby made a part hereof and marked Exhibit "C."

VIII.

On or about September —, 1913, the Traders Trust Company of Oregon made, executed and delivered to the Lumbermen's Trust & Savings Bank of Oregon aforesaid an assignment of said mortgage deed of the

Commonwealth Title Trust Company, as hereinbefore alleged and set forth and attached hereto as Exhibit "C," which assignment was duly filed of record in the office of the Auditor of Pierce County, Washington, on December 4, 1913, and at the same time made, executed and delivered to the said Lumbermen's Trust & Savings Bank aforesaid endorsements of the thirty-two (32) notes of the Title Insurance & Investment Company of Tacoma to the Traders Trust Company of Oregon aforesaid, and an assignment of the agreement of mortgage and pledge between the Title Insurance & Investment Company of Tacoma and the Traders Trust Company aforesaid, hereinbefore alleged and set forth and attached hereto as Exhibit "A," and an assignment of the instrument of guarantee between the Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove to the said Traders Trust Company of Oregon, hereinbefore alleged and set forth and attached hereto as Exhibit "B." Said assignments and endorsements to the Lumbermen's Trust & Savings Bank aforesaid were in trust for the benefit of the Marion Investment Company, a corporation organized and existing under the laws of the State of Oregon, and a citizen of said state; O. M. Smith and Ella M. Smith, each of whom is a citizen and resident of the State of Oregon with power and authority to the said trustee, in the event that the obligation of said notes, mortgage and agreements was complied with and fully performed, to make, execute and deliver any and all receipts, acquittances and conveyances or re-conveyances for and in behalf of its cesque trustents and its assignor, and in the event of default in any or all of

the conditions, obligations and agreements of said notes, mortgages and agreements, to bring suit for the enforcement thereof, and the foreclosure of any and all of the property pledged thereby. Upon the re-organization of the Lumbermen's Trust & Savings Bank as aforesaid, plaintiff Lumbermen's Trust Company became endowed with all the rights, powers and duties of the Lumbermen's Trust & Savings Bank aforesaid in the premises, and assumed its duties and obligations in the premises.

IX.

On December 7, 1914, there became due and payable, by the Title Insurance & Investment Company of Tacoma aforesaid, to the plaintiff, two thousand (\$2000.00) dollars interest upon the thirty-two (32) notes aforesaid. Said sum and no part thereof, was paid by the Title Insurance & Investment Company of Tacoma aforesaid, and upon default due notice thereof was, within ninety (90) days, given to the defendant Commonwealth Title Trust Company and to the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, but said sum of two thousand (\$2000.00) dollars, or any part thereof, was not paid by the said guarantors, or either of them, and there is now due and owing to the plaintiff by defendant Title Insurance & Investment Company of Tacoma, as principal, and by defendant Commonwealth Title Trust Company and Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove aforesaid said sum of two thousand (\$2000.00) dollars, with interest at five (5) per cent from and after December 7, 1914, in accordance with

the terms of said notes, mortgages and instruments of guarantee hereinbefore alleged and set forth and attached hereto as Exhibits "A," "B" and "C." The payment of said sum has been in default more than one year prior to the beginning of this suit.

X.

On June 7, 1915, there became due and payable, by the Title Insurance & Investment Company of Tacoma aforesaid, to the plaintiff, two thousand (\$2000.00) dollars interest upon the thirty-two (32) notes aforesaid. Said sum, and no part thereof, was paid by the Title Insurance & Investment Company of Tacoma aforesaid, and upon said default due notice thereof was given, within ninety (90) days, to the defendant Commonwealth Title Trust Company and to the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, but said sum of two thousand (\$2000.00) dollars or any part thereof, was not paid by the said guarantors, or either of them, and there is now due and owing to the plaintiff by defendant Title Insurance & Investment Company and Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove aforesaid said sum of two thousand (\$2000.00) dollars, with interest at five (5) per cent from and after June 7, 1915, in accordance with the terms of said notes, mortgages and instruments of guarantee hereinbefore alleged and set forth and attached hereto as Exhibits "A," "B" and "C."

XI.

On December 7, 1915, there became due and payable, by the Title Insurance & Investment Company of

Tacoma aforesaid, to the plaintiff, two thousand (\$2000.00) dollars interest upon the thirty-two (32) notes aforesaid. Said sum, and no part thereof, was paid by the Title Insurance & Investment Company of Tacoma aforesaid, and upon said default due notice thereof, within ninety (90) days, was given to the defendant Commonwealth Title Trust Company and to the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, but said sum of two thousand (\$2000.00) dollars, or any part thereof, was not paid by the said guarantors, or either of them, and there is now due and owing to the plaintiff by defendant Title Insurance & Investment Company of Tacoma, as principal, and by defendant Commonwealth Title Trust Company and Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove aforesaid said sum of two thousand (\$2000.00) dollars, with interest at five (5) per cent from and after December 7, 1915, in accordance with the terms of said notes, mortgages and instruments of guarantee hereinbefore alleged and set forth and attached hereto as Exhibits "A," "B" and "C." On said December 7, 1915, the principal as well as the interest of the first of said thirty-two (32) notes became due and payable by the defendant Title Insurance & Investment Company of Tacoma to the plaintiff, but neither the whole or any part thereof was paid. Due notice of said default of defendant Title Insurance & Investment Company of Tacoma was given to defendant Commonwealth Title Trust Company and to Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, but neither they, nor any of them, have paid the whole or any part of said principal sum, and

there is now due and owing and wholly unpaid from the said Title Insurance & Investment Company of Tacoma, as principal, and the Commonwealth Title Trust Company and Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, as guarantors, the sum of twenty-five hundred (\$2500.00) dollars with interest from and after December 7, 1915, at five (5) per cent.

XII.

By the terms of the deed of mortgage by the Commonwealth Title Trust Company to the Traders Trust Company of Oregon, hereinbefore alleged and set forth and attached hereto as Exhibit "C," the said defendant Commonwealth Title Trust Company agreed to pay and extinguish all taxes, assessments and other public charges which might, after the execution and delivery of said deed of mortgage, be levied, assessed or charged upon the mortgaged premises prior to such assessment or public charge becoming delinquent, so that the said mortgage should be and remain a first lien upon the mortgaged premises until the debts and moneys secured thereby were fully paid.

Plaintiff avers that the taxes for the year 1912 were not paid upon the mortgaged premises by the Commonwealth Title Trust Company or by any other person in its behalf, and became delinquent in the sum of three hundred fifteen and 56-100 (\$315.56) dollars, principal, and seventy-four and 17-100 (\$74.17) dollars interest. Plaintiff further avers that the taxes for the year 1913 were not paid upon the mortgaged premises by the Commonwealth Title Trust Company, or by any other person in its behalf, and became delinquent in the sum of three

hundred twenty-three and 79-100 (\$323.79) dollars, principal, and seventy-six and 10-100 (\$76.10) dollars, interest, and on June 12, 1914, a certificate of delinquency for said unpaid taxes and the interest thereon was issued to one Dwight Phelps of Tacoma, said certificate being No. 1561-C in the office of the Treasurer of Pierce County. Plaintiff further alleges that the defendant Commonwealth Title Trust Company is thereby in default and has been in default for more than one year before the beginning of this suit. Plaintiff further alleges that the taxes upon said mortgaged property for the year 1914 were not paid by the defendant Commonwealth Title Trust Company, or by any person in its behalf, and became delinquent in the principal sum of three hundred sixteen and 24-100 (\$316.24) dollars and twenty-eight and 47-100 (\$28.47) dollars, interest, and that on the 29th day of May, 1915, a certificate of delinquency of said unpaid taxes was issued to one Dwight Phelps of Tacoma. Plaintiff further avers that both of said certificates of delinquency are now outstanding and unsatisfied, but plaintiff is informed and believes and so alleges on information and belief, that said certificates of delinquency, and both of them, have been assigned by the said Dwight Phelps to the Commonwealth Title Trust Company, or to some person unknown to the plaintiff in behalf of said Commonwealth Title Trust Company.

XIII.

By the terms of the agreement of mortgage and pledge by and between the defendant Title Insurance & Investment Company of Tacoma and the Traders

Trust Company of Oregon, hereinbefore alleged and set forth and attached hereto as Exhibit "A," it is provided that time is of the essence of the agreement, and in the event of the failure of defendant Title Insurance & Investment Company of Tacoma to pay any of its said notes, or the interest thereon, at the time specified therein, and in the event such default shall continue for the period of one (1) year, then the whole of said notes and the indebtedness evidenced thereby shall, at the option of the said Traders Trust Company of Oregon, or its successors or assigns, forthwith and without notice mature, and that said pledge may forthwith be foreclosed, and any interest then in default shall bear interest at the rate of five (5) per cent per annum until paid.

By the terms of the agreement of guarantee by and between defendant Commonwealth Title Trust Company and the several individual guarantors aforesaid and the Traders Trust Company of Oregon, hereinbefore alleged and set forth and attached hereto and marked Exhibit "B," it is provided that time is of the essence of the agreement and in the event of any failure or default in any payment thereby guaranteed, and of the continuance of such default for a period of one year, then the whole amount covered by the said guarantee shall forthwith and without notice become due and payable at the election of said Traders Trust Company of Oregon, its successors and assigns.

By the terms of the deed of mortgage made, executed and delivered by the defendant Commonwealth Title Trust Company to the Traders Trust Company of Oregon, it is provided that upon any default

on the part of defendant Commonwealth Title Trust Company for the payment of the principal or interest, or upon any default of defendant Commonwealth Title Trust Company in keeping or performing any of its agreements in said mortgage set forth, and the continuance of such default for one (1) year, then the Traders Trust Company of Oregon, its successors and assigns, may elect to declare all sums secured by said mortgage due and payable without notice, including the then value of the unpaid guaranteed interest figured on the basis of five (5) per cent and including interest on all defaulted interest at five (5) per cent per annum, and may immediately cause said mortgage to be foreclosed.

By reason of the agreements aforesaid and by reason of the default of the defendants Title Insurance & Investment Company of Tacoma and Commonwealth Title Trust Company, plaintiff, as the successor and assigns of the Traders Trust Company of Oregon aforesaid, hereby elects to and declares the whole of said principal indebtedness, and the whole of the obligation of said guarantee, and the whole of the obligation of said mortgage due and payable.

XIV.

By the terms of the instrument of guarantee by and between the defendant Commonwealth Title Trust Company and Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, on the one hand, and the Traders Trust Company of Oregon, on the other hand, hereinbefore alleged and set forth and attached hereto and marked Exhibit "B," it is provided that so long as the

abstract plant therein referred to is held as security for the payment of the indebtedness, or any part thereof, therein referred to the Commonwealth Title Trust Company will correctly abstract all deeds, mortgages or other conveyances, mechanics' liens, and all miscellaneous records affecting the title to real property in Pierce County, Washington, cause the same to be arranged systematically and sent to the trustee agreed upon, with a proviso, however, that in the event of the payment of the interest and principal of said thirty-two (32) notes, at the time therein specified, or within one (1) year thereafter, then said provisions would be waived, but in the event of any default and the continuance of such default for one (1) year, then the said guarantor Commonwealth Title Trust Company was forthwith to furnish said instruments of record as agreed and to keep said records complete and up to date.

Plaintiff avers that the said guarantor Commonwealth Title Trust Company is in default as hereinbefore alleged, and has failed and neglected to complete the said records in the manner agreed upon, or in any manner, or in any part whatsoever; and plaintiff further avers that the necessary cost and expense of completing said records as agreed upon, and bringing the same down to date as agreed upon, is the sum of twenty thousand (\$20,000.00) dollars.

XV.

By the terms of the contract of guaranty hereto attached and marked Exhibit "B," the defendants Fred S. Fogg, Herbert H. Gove, Horace Fogg, Franklin Fogg agreed and guaranteed to and with Traders Trust

Company of Oregon that the undertakings of the Commonwealth Title Trust Company in said contract expressed and set forth were based upon a valuable consideration, sufficient in law to bind the said Commonwealth Title Trust Company, and that the said undertakings and each and all of them are valid and subsisting obligations of said Commonwealth Title Trust Company. The plaintiff is informed and believes and so alleges on information and belief that the defendant Commonwealth Title Trust Company denies that its said undertakings in said contract of guaranty were based upon a valuable consideration, and denies that any consideration therefor, moving to said defendant corporation, is sufficient in law to bind said corporation and, denies that said undertakings or any of them are valid and subsisting obligations of said corporate defendant. Plaintiff further is informed and believes and so alleges on information and belief that the said corporate defendant, Commonwealth Title Trust Company, asserts that its said agreements in said Exhibit "B" expressed and contained are void and of no binding force upon the said corporate defendant because the same are unconstitutional, void as against public policy, ultra vires and not within the power of the said corporate defendant to make, and are usurious.

XVI.

Plaintiff further avers that by the terms of the deed of mortgage by the defendant Commonwealth Title Trust Company to the Traders Trust Company of Oregon, hereinbefore alleged and set forth and attached hereto and marked Exhibit "C," it is provided that upon

foreclosure the said Traders Trust Company of Oregon, or its successors or assigns, shall be entitled to enter in any such suit or proceeding a judgment for any deficiency remaining due on account of the debt and moneys secured thereby, after the foreclosure sale of the premises described, and it is further provided that the purchaser at any foreclosure sale shall be entitled to the immediate possession of the premises sold; and it is further provided that the debt and all sums thereby secured shall be payable in gold coin of the United States; it is further provided in said mortgage, and in the notes thereby secured that in the event of any suit or proceeding for the recovery of the debt or money thereby secured, or for the foreclosure of said mortgage, the plaintiff in such suit shall have a right to have taxed as costs and included in the judgment or decree rendered therein a reasonable attorney's fee, and plaintiff avers that the sum of ten thousand (\$10,000.00) dollars is a reasonable sum so to be allowed as attorney's fees in this suit.

XVII.

Plaintiff further avers that this suit is of a civil nature in equity, and the amount and matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand (\$3000.00) dollars, and is between citizens of different states.

WHEREFORE, the plaintiff prays that it do have and recover of the defendant Title Insurance & Investment Company of Tacoma, judgment in the sum of eighty thousand dollars (\$80,000.00), with interest thereon in the sum of six thousand dollars (\$6000.00), and interest upon said unpaid interest in the sum of one

hundred fifty dollars (\$150.00) up to and including December 7, 1915, and with interest upon eighty-six thousand one hundred and fifty dollars (\$86,150.00) from December 7, 1915, to the date of the entry of judgment in this suit, less such sum as may be recovered from the defendant Commonwealth Title Trust Company upon its obligation to pay the whole or any part of such principal or interest; and for a degree of foreclosure and sale of the property pledged to secure said indebtedness as set forth in the instrument of pledge hereto attached and marked Exhibit "A."

Plaintiff further prays for judgment against defendant Commonwealth Title Trust Company in the sum of six thousand dollars (\$6000.00), interest due and unpaid December 7, 1915, together with one hundred fifty dollars (\$150.00) interest thereon to said date; and further for judgment against the defendant Commonwealth Title Trust Company for interest upon said eighty thousand dollars (\$80,000.00) and on six thousand dollars (\$6000.00) unpaid interest as aforesaid, from December 7, 1915, until the entry of the decree of this court at the rate of five per cent (5%) per annum; and further for judgment against the defendant Commonwealth Title Trust Company in such sum as, placed at interest to be earned by said eighty thousand dollars from the date of the decree of this court until the 7th day of December 1921; and for the further sum of seventeen thousand five hundred dollars (\$17,500.00) upon the principal indebtedness of the first seven (7) of the thirty-two (32) notes of the Title Insurance & Investment Company of Tacoma aforesaid.

Plaintiff further prays for the judgment and decree of this court that the defendant Commonwealth Title Trust Company forthwith without delay and before any sale of the property pledged to secure the indebtedness of the Title Insurance & Investment Company of Tacoma as set forth in said Exhibit "A," specifically perform its obligation and engagement as set forth in Exhibit "B," to correctly abstract all deeds, mortgages or other conveyances, mechanics' liens and all miscellaneous records, whether herein specifically mentioned or not, affecting the title to real property in Pierce County, Washington, cause the same to be arranged according to fee numbers, bound and properly identified, and deliver to the plaintiff; or in the event that said defendant for any reason shall not be able, or shall refuse to comply with the decree of this court in this regard, for damages against the said defendant in the sum of twenty thousand dollars (\$20,000.00).

Plaintiff further prays that the mortgage upon the property described in said deed of mortgage hereto attached and marked Exhibit "C," may be foreclosed and that the said property may be sold to satisfy the said indebtedness; and in the event it shall appear that the certificates of delinquency now outstanding against said property are not satisfied of record, that such further sum as may be necessary to pay, satisfy and retire said certificates of delinquency and any and all other charges and liens upon said property may be added to and become a part of the principal debt secured by said mortgage; plaintiff further prays that in the event the property so sold shall not, at such sale, bring a sum sufficient to satisfy such indebtedness, as it may then be

determined by final decree of this court, that a judgment for such deficiency in favor of the plaintiff and against the defendant Commonwealth Title Trust Company be rendered and made.

Plaintiff further prays that if for any reason the agreements and undertakings aforesaid of the defendant Commonwealth Title Trust Company be found by the court to be not valid, subsisting and enforceable against the said corporate defendant Commonwealth Title Trust Company, that the plaintiff have judgment, jointly and severally, against the defendants Fred S. Fogg, Herbert H. Gove, Horace Fogg and Franklin Fogg, for such a sum as may be found by the court to be due upon the guaranty of the Commonwealth Title Trust Company.

Plaintiff further prays for the recovery against the defendants, and each of them, of its costs and disbursements in this suit, including an attorney's fee in the sum of ten thousand dollars (\$10,000.00), and for such other and further relief as may in equity be meet and just.

FRANK H. KELLEY,

JOHN H. HALL,

Solicitors for Plaintiff.

Room 717 Tacoma Building, Tacoma, Washington.

Exhibit "A."

WHEREAS, the Title Insurance & Investment Company of Tacoma has been heretofore indebted unto the Title Insurance & Investment Company of Washington, in the sum of eighty thousand (\$80,000.00) dollars, said indebtedness being secured by certain mortgage covering the abstract of title plant and property of said first-named company, which mortgage was filed and recorded on December 9th, 1909, in the office of the auditor of Pierce County, Washington, auditor's fee numbers 305258 and 305259, in Book 23 of Chattel Mortgages, at page 429, which said mortgage was, for a valuable consideration, assigned by the second named company unto the Traders Trust Company, of Oregon, an Oregon corporation, and which said mortgage is contemporaneously with this agreement satisfied of record by the said Traders Trust Company;

NOW, THEREFORE, in consideration of the satisfaction of said mortgage and the delivery to the said The Title Insurance & Investment Company of Tacoma of the notes evidencing said indebtedness,

IT IS AGREED between the Title Insurance & Investment Company of Tacoma, a Washington corporation, first party, and the Traders Trust Company, of Oregon, second party, as follows, to-wit:

I.

First party shall and does, contemporaneously herewith execute and deliver to second party its certain promissory notes in the aggregate sum of eighty thousand (\$80,000.00) dollars, each of said notes being for the principal sum of twenty-five hundred (\$2500.00) dollars, and each bearing interest at five (5%) per cent per annum, payable semi-annually, on the 7th day of December and the 7th day of June of each year, and maturing as follows, to-wit: The first note maturing on the

7th day of December, 1915, and one note maturing each year thereafter.

II.

The first party agrees to and does hereby turn over to the second party the said plant and property of the first party, being the property covered by said mortgage (excepting certain furniture hereinafter referred to), which said plant and property is to be held by said second party in pledge for its security for the payment of said sum of eighty thousand (\$80,000.00) dollars. Said pledge and property shall be forthwith shipped to Portland, Oregon, at the expense of the second party, and it is to be there placed in a vault or other secure place agreed upon by the parties hereto. Said vault or other secure place where said property is placed shall be so constructed that it can only be opened by the use of two (2) keys. One of said keys shall be in the possession of the party of the second part. The other of said keys shall be in the possession of Frank Branch Riley or other person selected by both the parties to this agreement, who shall have written directions whereby access to said plant and property, except for the mere purpose of inspection, shall be allowed either of the parties to this agreement only by the consent of both of such parties. Provided, that upon the production of a certified copy of a decree of foreclosure of this pledge, such decree being entered by any court of competent jurisdiction, the second party shall be entitled to the immediate possession of said key, and to the immediate access thereafter, and control of said plant, the intent hereof being that said plant shall be held by the said trustee primarily to secure the said notes and the provisions of this pledge to the party of the second party. The first party will promptly pay any and all taxes now assessed in the State of Washington against said plant or property, including the taxes which become payable in February,

1912. The second party is to pay any taxes and assessments which may be hereafter levied or assessed against said property during the existence of this agreement, but each party is to pay one-half the storage charges. Upon the full payment of said notes and all of them by the first party to the second party, or its assigns, the said property shall be surrendered to the first party, its successors and assigns, and the key in the possession of the second party shall be surrendered to the first party, its successors and assigns.

III.

The property hereinbefore referred to as not delivered to the second party under the terms of this agreement as a pledge, consists of certain furniture of the agreed value of one thousand dollars (\$1000.00), which has been agreed upon between the parties, and is to be and is taken by the second party in payment of the sum of one thousand dollars (\$1000.00) being certain deferred interest upon the mortgage indebtedness hereinbefore referred to. Said payment does not constitute any payment upon the obligations secured by this agreement of pledge.

IV.

As long as the first party is not in default in the payment of any of the obligations secured by this agreement, and until the foreclosure of this pledge, the second party shall not operate or use said plant.

V.

Time shall be and is of the essence of this agreement and in the event of the failure of the first party to pay any of said notes at the time specified in said notes, or to pay any taxes which the first party agrees to pay, and after the continuance of such default for the period of one (1) year, then the whole of said notes shall, at

the option of the second party, forthwith and without notice, mature, and the second party shall be entitled forthwith to foreclose said pledge. Defaulted interest shall bear interest at five (5%) per cent per annum from the default until paid.

PROVIDED, that nothing in this paragraph or in this agreement shall be construed to prevent the second party, at its option, from suing upon any unpaid installment of principal and interest, without waiting for the expiration of one (1) year from the date of default, provided ninety (90) days notice of such default shall have first been given in writing to the first party or its assigns.

IN WITNESS WHEREOF, the parties to this agreement have executed the same this 2nd day of December, 1911, by their officers thereunto duly authorized.

THE TITLE INSURANCE & INVESTMENT
COMPANY OF TACOMA,

By (sig) H. H. Gove,
Its President.

Attest: (sig.) Jesse Thomas,
Secretary.

TRADERS TRUST COMPANY OF OREGON,

By (sig.) A. D. Willoughby,
Its President.

Attest: (sig.) O. M. Smith,
Secretary.

Exhibit "B."

WHEREAS, the Title Insurance & Investment Company of Tacoma, a Washington corporation, has, for a valuable consideration, executed its certain promissory notes in favor of the Traders Trust Company of Oregon, in the principal sum of eighty thousand (\$80,000.00) dollars, said notes being thirty-two (32) in number, each being for twenty-five hundred (\$2500.00) dollars, each bearing interest at five per cent (5%) per annum, payable semi-annually, and bearing even date herewith; and,

WHEREAS, as additional security for the payment of said notes, and as an inducement to the said Traders Trust Company to accept said notes in lieu of certain other notes which they now hold, and as an inducement to said Traders Trust Company, to discharge of record a certain chattel mortgage which it holds on the abstract plant and other property of the Title Insurance & Investment Company of Tacoma, the undersigned, Commonwealth Title Trust Company, has agreed to execute this instrument, and the Commonwealth Title Trust Company has also agreed to execute a mortgage covering the following described property, to-wit:

"Beginning at a point on the northerly side of South Tenth street, City of Tacoma, distant 80.04 feet westerly of the point of intersection of the northerly line of South Tenth street with the westerly line of 'A' street in said City of Tacoma; thence northerly and parallel with the westerly line of 'A' street 125 feet; thence at right angles westerly 19.69 feet; thence at right angles southerly and parallel with the westerly line of 'A' street 125 feet to the northerly line of said South Tenth street; thence at right angles easterly to the place of beginning.

"And also a right-of-way in, over and along the following described land situated in the said City of Tacoma, to-wit:

“Beginning at a point on the westerly line of ‘A’ street formed by the intersection of said westerly line of ‘A’ street with the southerly line of lot seven (7), block 902, City of Tacoma; thence westerly along the southerly line of lot seven (7), 120 feet to the easterly line of the alley between said ‘A’ street and Pacific avenue; thence at right angles southerly 10 feet; thence at right angles easterly 120 feet to the westerly line of ‘A’ street; thence at right angles northerly 10 feet to the place of beginning; subject, nevertheless, and reserving to the owners of property adjoining the perpetual right-of-way through and along so much of said land last described in conformity with one certain deed from William C. Bardsley, and wife, dated April 15th, 1901, and recorded in book 166, at page 396.” Said mortgage being of even date herewith, and being made to secure the payment of the first seven of the notes above referred to and also to secure the interest as it matures on the entire purchase price down to and including the time of maturity of the last of said first seven notes;

NOW, THEREFORE, in consideration of the premises, IT IS AGREED between the Commonwealth Title Trust Company and the said Traders Trust Company of Oregon, as follows, to-wit:

The said Commonwealth Title Trust Company does hereby guarantee to and with the Traders Trust Company of Oregon, the payment of the first seven of said notes and each and every of said seven notes, in accordance with their terms and conditions, and further guarantees to and with the said Traders Trust Company of Oregon, the payment of the interest in accordance with the terms of each and all of the thirty-two (32) notes referred to above, at the times specified in each of said notes, down to and including the interest maturing December 7th, 1921; and also guarantees the payment promptly by the Title Insurance & Investment

Company of Tacoma, of the taxes now due or which mature in February, 1912, against the said plant, and other property of the Title Insurance & Investment Company of Tacoma.

IT IS FURTHER AGREED, that time shall be and is of the essence of this agreement of guaranty, and in the event of any failure or default in any payment hereby guaranteed to be made and of the continuance of such default for a period of ninety days, after written notice thereof to the guarantor in writing, the Traders Trust Company of Oregon, its successors or assigns, may bring a proper action against the guarantor, and in the event of the continuance of such default for a period of one year, after such default shall have been made, then the whole amount covered by this guaranty shall forthwith and without notice become due and payable, at the election of said Traders Trust Co.

In the latter event the guarantor shall be liable to the Traders Trust Company of Oregon, its successors and assigns, for the principal of the first seven of said notes, and the interest on all of said thirty-two (32) notes down to the time of the entry of judgment thereon, but not in any event including interest longer than to December 7th, 1921, and the Traders Trust Company of Oregon shall be entitled to judgment for a sum in addition to such principal and interest equal to the then value of the unpaid guaranteed interest on all of said notes, figured on the basis of 5%. The limitation herein contained on the liability of the guarantor is not intended and shall not affect the liability of the Title Insurance & Investment Company of Tacoma.

The Commonwealth Title Trust Company for the same condition does hereby agree that so long as the abstract plant heretofore and now the property of the Title Insurance & Investment Company of Tacoma, is held as security for the payment of said indebtedness or

any part thereof, it will correctly abstract or cause to be abstracted, all deeds, mortgages, or other conveyances, mechanics' liens, and all miscellaneous records, whether herein specifically mentioned or not, affecting the title to real property in Pierce County, Washington, in the same manner as has heretofore been performed by the Commonwealth Title Trust Company, and cause the same to be arranged according to fee numbers or other system, satisfactory to the Traders Trust Company of Oregon, or its assigns, and cause the same to be bound and properly identified in the customary manner, boxed, wrapped and shipped to the trustee chosen by the Title Insurance & Investment Company of Tacoma and the Traders Trust Company of Oregon, in accordance with the terms of a certain agreement of pledge made between the Title Insurance & Investment Company of Tacoma, first party, and the Traders Trust Company of Oregon, second party, of even date herewith, at Portland, Oregon.

PROVIDED, HOWEVER, in consideration of this covenant, the said Traders Trust Company of Oregon, its successors and assigns, does hereby waive the right to demand such "take-offs" so long as each and every of the payments of interest and the principal is made at the times specified in said notes, and each of them, or within one year thereafter, and so long as each and every of the covenants on the part of the Title Insurance & Investment Company of Tacoma, in said agreement of pledge of even date herewith, are kept and performed at the times therein agreed; in the event of such default, and its continuance for one year, however, the undersigned, Commonwealth Title Trust Company, agrees that it will forthwith furnish or cause to be furnished to the Traders Trust Company of Oregon, its successors and assigns, all the "take-offs" necessary to complete said plant in the manner hereinbefore specified and thereafter as long as said plant or any part thereof

is held as security for such indebtedness, it will keep said plant down to date in such manner.

The undersigned, Fred S. Fogg, Herbert H. Gove, Horace Fogg, and Franklin Fogg, in consideration of the acceptance of the foregoing guaranty and agreement by the said Traders Trust Company of Oregon, and other valuable considerations, do hereby agree and guarantee to and with the Traders Trust Company of Oregon, that the foregoing guaranty and each and every part thereof, is based upon a valuable consideration, sufficient in law to bind the Commonwealth Title Trust Company, and that the same is a valid and subsisting obligation of said company.

IN WITNESS WHEREOF, the Commonwealth Title Trust Company and the said individuals, have executed this instrument, the Commonwealth Title Trust Company by its officers duly authorized by resolution of the board of trustees, and of its stockholders, this 2nd day of December, A. D. 1911.

COMMONWEALTH TITLE TRUST
COMPANY,

By (sig.) Horace Fogg, President.

(sig.) Horace Fogg,

(sig.) Franklin Fogg,

(sig.) Fred S. Fogg,

(sig.) Herbert H. Gove.

Attest: Franklin Fogg, Secretary.

Exhibit "C."

THIS INDENTURE WITNESSETH, that Commonwealth Title Trust Company, a corporation organized under the laws of the State of Washington, party of the first part, for and in consideration of the sum of ten dollars (\$10.00) and other valuable consideration in gold coin of the United States of America, to it in hand paid by Traders Trust Company of Oregon, a corporation organized under the laws of the State of Oregon, party of the second part, has granted, bargained and sold, and by these presents does grant, bargain, sell, convey and warrant unto the said party of the second part, and to its successors and assigns, the following described premises, situate, lying and being in the County of Pierce, State of Washington, to-wit:

Beginning at a point on the northerly side of South Tenth street, City of Tacoma, distant 80.04 feet westerly of the point of intersection of the northerly line of South Tenth street with the westerly line of "A" street in said City of Tacoma; thence northerly and parallel with the westerly line of "A" street, 125 feet; thence at right angles westerly 19.69 feet; thence at right angles southerly and parallel with the westerly line of "A" street 125 feet to the northerly line of said South Tenth street; thence at right angles easterly to the place of beginning.

And also a right-of-way in, over and along the following described land situated in the said City of Tacoma, to-wit:

Beginning at a point on the westerly line of "A" street formed by the intersection of said westerly line of "A" street with the southerly line of lot 7, block 902, City of Tacoma; thence westerly along the southerly line of lot 7, 120 feet to the easterly line of the alley between said "A" street and Pacific avenue; thence at right angles southerly 10 feet; thence at right angles easterly 120 feet to the westerly line of "A" street; thence at

right angles northerly 10 feet to the place of beginning; subject, nevertheless, and reserving to the owners of property adjoining the perpetual right-of-way through and along so much of said land last described in conformity with one certain deed from William C. Bardsley and wife, dated April 15, 1901, and recorded in book 166 at page 396.

TO HAVE AND TO HOLD, the said premises, with all their appurtenances, unto the said party of the second part, and to its successors and assigns forever; and the said party of the first part, for itself and its successors and assigns does hereby covenant to and with the said party of the second part, its successors and assigns, that it is the owner in fee simple of said premises, that the same are free from all encumbrances, and that it will warrant and defend the title thereto against all lawful claims whatsoever.

THIS CONVEYANCE IS INTENDED AS A MORTGAGE, and is given to secure the payment of the interest as it matures on 32 certain promissory notes of twenty-five hundred dollars (\$2500.00) each made by the Title Insurance & Investment Company of Tacoma, a Washington corporation, to the Traders Trust Company of Oregon, an Oregon corporation, said notes being of even date herewith, and bearing interest at five per cent (5%) per annum, payable semi-annually, the first maturing December 7, 1915, and one maturing each year thereafter down to and including the interest maturing December 7, 1921, which interest down to December 7, 1921, has been guaranteed by first party and to secure the principal of the first seven (7) of said notes, which principal has also been guaranteed by first party.

Said party of the first part hereby agrees to keep the buildings, fences and other improvements upon said premises in as good condition and repair as the same

are now in or may be put into during the continuance of the lien of this mortgage, and shall not commit or permit any waste of said premises until the moneys and debt hereby secured are fully paid.

Said party of the first part hereby agree to pay and extinguish all taxes, assessments and other public charges which may be levied, assessed or charged upon said premises, or upon this mortgage or the notes hereby secured, prior to such assessment or public charges becoming delinquent, and, also, to pay and discharge all prior liens, claims, adverse titles or encumbrances on said premises, so that this mortgage shall be and remain a first lien thereon until the debt and moneys hereby secured are fully paid.

Said party of the first part hereby agree that in the event it shall fail or neglect to make said repairs, and pay and discharge all taxes, assessments and other public charges which may be levied, assessed or charged upon said premises, and pay and discharge all liens, claims, adverse titles and encumbrances on said premises as above agreed, then the said party of the second part, its successors or assigns, may elect to pay and discharge any or all of the same, and cause said repairs to be made, and all moneys so expended and paid, with interest thereon at the rate of — per cent per annum, from the date of such payments or expenditures until the same is wholly repaid, shall be a lien on said premises above described, and be secured by this mortgage and collected in the same manner as the principal debt hereby secured. Upon any default on the part of the party of the first part in the payment of principal or interest when due or in keeping and performing any of the above agreements and the continuance of such default for one year, said party of the second part, its successors or assigns, may elect to declare all sums secured hereby due and payable without notice, including the then value of the

unpaid guaranteed interest figured on the basis of 5%, and including interest on all defaulted interest at 5% per annum, and may immediately cause this mortgage to be foreclosed in the manner provided by law, whether he or they shall elect to pay any of the sums above referred to or not.

Said party of the first part hereby agree that in any suit or other proceeding commenced for the recovery of the debt or moneys hereby secured or for the foreclosure of this mortgage, said party of the second part, its successors or assigns, shall have the right to have taxed as costs and included in the judgment or decree rendered in such suit or proceeding a reasonable attorneys' fee equal to — per cent of the total amount found due.

Said party of the first party hereby agrees that in any suit or other proceeding commenced for the recovery of the debt and moneys hereby secured, or for the foreclosure of this mortgage, the party of the second part, its successors or assigns, shall be entitled to have entered in any such suit or proceeding a judgment for any deficiency remaining due on account of the debt and moneys hereby secured after the foreclosure sale of the premises above described.

Said party of the first part hereby agrees that in case of the foreclosure of this mortgage the purchaser at any sale had thereunder shall be entitled to the immediate possession of the premises so sold, whether the same then be occupied as a homestead or not.

It is mutually agreed and understood that the debt and all sums hereby secured are payable in gold coin of the United States of America.

It is mutually understood and agreed that upon the full performance of the foregoing covenants and agreements at the time and in the manner specified, then this indenture shall be void and a discharge thereof given at

the expense of the party of the first part, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said party of the first part has hereunto signed its corporate name and affixed its corporate seal by its officers hereunto duly authorized this 2nd day of December, 1911.

COMMONWEALTH TITLE TRUST
COMPANY,

Attest: (signed) Franklin Fogg, Secretary.

By (signed) Horace Fogg, President.

Signed, sealed and delivered in the presence of:

(Signed) E. M. Hayden.

(Signed) Jesse Thomas.

(Corporate seal.)

ANSWERS.

The answer of defendant Commonwealth Title Trust Company, which by stipulation stood also as the answers of the individual defendants, was as follows:

Comes now the above-named defendant Commonwealth Title Trust Company, reserving all manner of exceptions that may be had to the insufficiencies, uncertainties and imperfections of plaintiff's complaint, and for answer to so much thereof as it is advised is material to be answered.

I.

Denies that any part of the capital stock of Title Insurance & Investment Company of Tacoma, is owned, or ever has been owned by this defendant.

II.

Denies that Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, are now, or ever have been, the sole and only owners of the capital stock of this defendant.

III.

Admits that on or about the 2nd day of December, 1911, defendant Title Insurance & Investment Company of Tacoma, signed the notes set forth in the fifth paragraph of said complaint, and signed the agreement which is attached to said complaint, marked "Exhibit A," but denies that there was a valuable or lawful consideration, or any consideration for the executing and delivering of said notes and said agreement.

IV.

Admits that on or about the 2nd day of December, 1911, the defendants Commonwealth Title Trust Company, a corporation, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, signed and delivered to the Traders Trust Company of Oregon, a certain paper writing in words and figures as set forth in "Exhibit B," attached to the complaint herein, with the following exception. That the words, "on the part of the individual guarantors" in the twenty-seventh line on the second page of Exhibit "B" were not contained in, and are not a part of said original writing. That the words "Commonwealth Title Trust Company" were contained in said original writing after the word "under-signed," in the third line of the third page of said Exhibit "B," attached to the complaint. That instead of the word "they," being the fourth word in the third line on the third page of said Exhibit "B," attached to the complaint, the original writing contained the word "it."

V.

Admits that on or about the 2nd day of December, 1911, the defendant Commonwealth Title Trust Company signed and delivered to the Traders Trust Company of Oregon, the paper writing, a copy of which is attached to the complaint herein marked "Exhibit C," but denies that there was any valuable or lawful consideration therefor.

VI.

Denies that on the 7th day of December, 1914, or at any time, there became due and payable by Title Insurance & Investment Company of Tacoma to the

plaintiff, two thousand dollars interest, or any sum, upon the thirty-two notes described in the complaint. Admits that said sum of two thousand dollars, and no part thereof was paid by the Title Insurance & Investment Company of Tacoma, but denies that upon such alleged default that due, or any, notice thereof was within ninety days, or any time, given to the defendant Commonwealth Title Trust Company, and to the defendants, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, but admits that said sum of two thousand dollars was not paid by them, or either of them. Denies that there is now due and owing to the plaintiff by defendant Title Insurance & Investment Company of Tacoma as principal, or at all, and by defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, the sum of two thousand dollars, with interest at 5%, from and after December 7th, 1914, or any sum whatever. Denies that payment of said sum has been in default more than one year prior to the beginning of this suit, or at all.

VII.

Denies that on June 7th, 1915, or at all, there became due and payable by the Title Insurance & Investment Company of Tacoma to the plaintiff, two thousand dollars interest upon the thirty-two notes aforesaid, or any sum. Admits that said sum and no part thereof was paid by the Title Insurance & Investment Company of Tacoma aforesaid, but denies that upon such alleged default due, or any, notice thereof was given within ninety days, or at any time, to the defendant Common-

wealth Title Trust Company, and to the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them. Admits that said sum of two thousand dollars, or any part thereof was not paid. Denies that there is now due and owing to the plaintiff by the defendant Title Insurance & Investment Company of Tacoma, as principal, or otherwise, and by defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, said sum of two thousand dollars with interest at 5% from and after June 7th, 1915, or any sum.

VIII.

Denies that on December 7th, 1915, there became due and payable by the Title Insurance & Investment Company of Tacoma to plaintiff, two thousand dollars, or any sum, interest upon the thirty-two notes described in the complaint. Admit that said sum of two thousand dollars, and no part thereof was paid by the Title Insurance & Investment Company of Tacoma, but denies that upon said alleged default due notice, or any notice thereof, within ninety days, or within any time, was given to the defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, but admits that said sum of two thousand dollars, or any part thereof was not paid. Denies that there is now due and owing to the plaintiff by the defendant Title Insurance & Investment Company of Tacoma, as principal, or otherwise, and by defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg

and Herbert H. Gove, or either of them, said sum of two thousand dollars, with interest at 5% from and after December 7th, 1915, or any sum. Denies that on said December 7th, 1915, the principal, as well as the interest of the first of said thirty-two notes, or any sum, became due and payable by the defendant Title Insurance & Investment Company of Tacoma to the plaintiff, but admits the same were not paid. Denies that due or any notice of said alleged default was given to defendants Commonwealth Title Trust Company and to Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them. Admits that neither or any of them have paid the whole or any part of said principal sum, but denies that there is now due and owing and wholly unpaid from the said Title Insurance & Investment Company as principal, or otherwise, and the defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, as guarantors, or otherwise, the sum of twenty-five hundred dollars, with interest from and after December 7th, 1915, at 5%, or any sum.

IX.

Admits that the taxes on the real estate described in plaintiff's complaint were not paid, and that certificates of delinquency were issued thereon for the taxes for the years 1912, 1913 and 1914, as set forth in the twelfth paragraph of said complaint, and that the defendant Commonwealth Title Trust Company is now the owner and holder of said certificates of delinquency, but this defendant specifically denies each and every of the other allegations in said paragraph twelve.

X.

Denies that by the terms of Exhibit "A" it is provided that in event of the failure of defendant Title Insurance & Investment Company of Tacoma to pay the interest on any of its said notes at the time specified therein, and in the event such default shall continue for the period of one year, then the whole of said notes and indebtedness evidenced thereby shall at the option of the said Traders Trust Company of Oregon, or its successors or assigns, forthwith and without notice mature, and that said pledge may forthwith be foreclosed and any interest then in default shall bear interest at the rate of 5% per annum until paid. Denies that payment of any installment of principal has been in default one year or for 90 days, and denies that 90 days notice of any default in payment of any installment of principal has been given.

XI.

Denies that by the terms of the paper writing attached to the plaintiff's complaint, marked Exhibit "B," the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, were to furnish the abstract instruments of record mentioned in the fourteenth paragraph of said complaint, or to keep said records complete and up-to-date, as therein alleged. Denies that the said defendant Commonwealth Title Trust Company, or defendants Franklin Fogg, Horace Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, were in default in that regard, and denies that they, or either of them, have failed and neglected to complete the said records in the manner agreed upon,

or in any manner, or in any part whatsoever, and denies that the necessary cost and expense of completing said records and bringing the same down to date is the sum of ten thousand dollars, or any sum whatever.

XII.

Answering paragraph fifteen, of said complaint, this defendant denies that the sum of ten thousand dollars, or any sum greater than \$1500, is a reasonable sum to be allowed as attorneys' fees in any judgment or decree rendered herein in favor of plaintiff.

Second.

And further answering said complaint, and by way of affirmative matter, constituting a first affirmative defense thereto, this answering defendant says:

I.

That plaintiff's bill of complaint does not state facts sufficient to constitute a valid cause of action in equity against this defendant, nor are the facts stated therein sufficient to entitle plaintiff to any relief against this defendant.

Third.

And further answering said complaint, and by way of affirmative matter constituting a second affirmative defense thereto, this answering defendant alleges:

I.

That on December 2nd, 1911, and for a long time prior thereto, defendant Title Insurance & Investment

Company, of Tacoma, was the owner of, and was engaged in actively operating a complete abstract of title plant, consisting of maps, books and records pertaining to real property titles within Pierce County, Washington, at Tacoma, Washington, and was actively engaged in the business of making and selling abstracts of title to real estate situated exclusively in Pierce County, Washington, and in collecting data and information necessary to the efficient operation of said plant, all of which was in opposition to and in competition with a similar business then, and for a long time theretofore conducted by defendant Commonwealth Title Trust Company, who at said time, and for a long time prior thereto, had been the owner of a similar plant, and who was, and for a long time prior thereto had been engaged as a rival and competitor of said defendant Title Insurance & Investment Company of Tacoma, in the making and selling of abstracts of title to real estate situate exclusively in Pierce County, Washington, and in collecting the data and information pertaining to real property titles within Pierce County, Washington, necessary and proper to conduct and maintain an efficient abstract plant. That at said time said defendants Commonwealth Title Trust Company and Title Insurance & Investment Company were, and for a long time prior thereto had been doing practically all of the abstract of title business in said Pierce County, Washington, and that defendant Commonwealth Title Trust Company, a corporation, contemplated and intended to continue indefinitely in said business.

That at the time of entering into said agreement set out in plaintiff's complaint, the indebtedness of Title

Insurance & Investment Company of Tacoma to Traders Trust Company of Oregon, and the interest on the entire indebtedness of eighty thousand dollars, and the mortgage given to secure the same, referred to in the first paragraph of plaintiff's Exhibit "A," were in full force and effect, and that a payment of five thousand dollars on account of the principal and the interest on the entire indebtedness of eighty thousand dollars, were about to become due and payable, and said Title Insurance & Investment Company of Tacoma was unable to pay the same, and had no other assets except said abstract plant, and had so notified said Traders Trust Company of Oregon, the then holder of said indebtedness. That a copy of said mortgage referred to in the first paragraph of said Exhibit "A" is hereto attached marked "Exhibit 1," and made a part hereof for all purposes.

That by the terms of said mortgage it was expressly provided that said Title Insurance & Investment Company of Tacoma should maintain and operate the said abstract office and plant mentioned therein during the entire life of said mortgage, and should make and issue abstracts to customers, solicit business and use its best endeavors to enlarge and build up the business then carried on by the mortgagee, all of which was to be done under the supervision of a person designated by said Traders Trust Company of Oregon, and that in event of a failure by said Title Insurance & Investment Company of Tacoma to pay the interest, or any installment of principal, or any part thereof, said entire indebtedness should at once become due and payable, and said Traders Trust Company of Oregon should have the right to take immediate possession of said entire abstract

plant, and sell the same and apply the proceeds to the payment of said entire indebtedness.

That at said time said Traders Trust Company of Oregon, and one A. D. Willoughby and O. M. Smith and Ella Smith, the last three named persons who were the substantial owners and officers of said Traders Trust Company of Oregon, intended and were threatening to take possession of said abstract plant on December 7, 1911, the date when said interest and installment of principal became due, if the same was paid, and sell said abstract plant and acquire and operate the same as a going concern, in direct competition with the business carried on by the defendant Commonwealth Title Trust Company in said Pierce County.

That for the sole and only consideration, and for the sole and only purpose of removing and restraining the rivalry and competition then existing in the abstract business in Pierce County, Washington, and for the sole and only consideration and purpose of inducing said Traders Trust Company of Oregon and Title Insurance & Investment Company of Washington, and said Willoughby, Smith and wife, referred to in plaintiff's complaint, and any other person or persons who might become purchasers at the foreclosure sale of said plant and business of said Title Insurance & Investment Company of Tacoma, from engaging in or entering into the abstract business in Pierce County, Washington, in competition with this defendant, and for the purpose insofar as possible of giving this defendant a monopoly of such business within said Pierce County, Washington, and for no other purpose, or consideration, the agreements referred to in plaintiff's complaint were entered

into, and in pursuance of said agreements said Traders Trust Company of Oregon took possession of said abstract plant of defendant, Title Insurance & Investment Company of Tacoma, and moved the same to Portland, Oregon, where the same was placed in a secure vault under the joint control of said Traders Trust Company of Oregon, and defendant Title Insurance & Investment Company of Tacoma, to be there kept and not used for any purpose whatsoever during the life of said agreements, and under the conditions therein provided, and said Title Insurance & Investment Company of Tacoma withdrew as a rival and competitor of defendant Commonwealth Title Trust Company in the abstract business in Pierce County, Washington, and discontinued and abandoned said business. That in pursuance of said agreements said Traders Trust Company of Oregon, and said A. D. Willoughby and O. M. Smith and Ella Smith, his wife, refrained from foreclosing said mortgage and pledge on said abstract plant, and refrained from entering the abstract business in Pierce County, Washington, thereby giving the defendant Commonwealth Title Trust Company a practical monopoly of the abstract business in Pierce County, Washington, and thereafter the defendant Commonwealth Title Trust Company did practically all of the abstract of title business transacted, and made and sold practically all of the abstracts of title relating to real property that were made and sold within Pierce County, Washington.

That at the time of the making of said agreements of December 2nd, 1911, as herein alleged, and at all times subsequent thereto, the Marion Investment Company

referred to in plaintiff's complaint was, and now is, owned and controlled by said A. D. Willoughby and wife.

That concurrent with the execution of said agreements of December 2nd, 1911, and as part of the consideration thereof and as a part of said transaction, said A. D. Willoughby and O. M. Smith, made, executed and delivered their certain agreement in writing wherein they agree not to transact or engage in the abstract of title business in Pierce County, Washington, during the period covered by said agreements, which said agreement with said Willoughby and Smith is hereto attached marked "Exhibit 2," and made a part hereof for all purposes. That all of said agreements mentioned in said complaint were prepared by said Traders Trust Company of Oregon, A. D. Willoughby and O. M. Smith, and such of said agreements as were executed by the officers of said Commonwealth Title Trust Company, as in this answer alleged, were executed at the instance of said Traders Trust Company, said A. D. Willoughby and O. M. Smith, and pursuant to a resolution of authority therefor prepared by said Traders Trust Company of Oregon, A. D. Willoughby and O. M. Smith, and by them presented to defendant Commonwealth Title Trust Company for adoption, a copy of which said resolution is hereto attached marked Exhibit "3," and made a part hereof for all purposes.

That defendant is advised by counsel, and therefore alleges the facts to be, that said agreements, and each of them, were and are in violation of the constitution and laws of the State of Washington, and were and are against public policy, illegal and void, and that defendant should not comply with or act said agreement.

Fourth.

By way of a further answer and third affirmative defense to plaintiff's complaint this defendant alleges:

I.

That the defendant Commonwealth Title Trust Company is, and was at all times in the complaint mentioned, and for several years prior thereto, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and engaged solely in the business of making and selling abstracts of title to lands in Pierce County, Washington, and in making and maintaining an abstract plant at Tacoma, in said County and State. That it was not authorized by its articles of incorporation, nor was it engaged in the business of becoming surety or guarantor for any person, firm or corporation for the contracts, undertakings or obligations of third person.

That the agreement "Exhibit B," and said indenture of mortgage, "Exhibit C," attached to plaintiff's complaint, were each and all made and executed wholly without consideration, and said defendant directly or indirectly never received any consideration or any money or property or labor, or thing of value therefor, or in connection therewith, nor were its assets in any way increased thereby. That defendant is advised by counsel, and therefore alleges the fact to be, that the execution of said instruments and said mortgage, referred to in plaintiff's complaint were, and are each and all in violation of the constitution and laws of the State of Washington, and beyond the powers of this defendant, and

were, and are illegal and void, and the defendant should not comply with or act under said agreements, or recognize the same as valid and binding.

Fifth.

This defendant without admitting any liability whatever upon the agreements and mortgage set forth in plaintiff's complaint, as executed by it, and expressly denying the validity and legality of the same, and denying any liability thereunder, and expressly reserving to itself the defenses hereinbefore in this answer interposed, for a partial defense to plaintiff's complaint alleges:

I.

That the agreement executed by the Commonwealth Title Trust Company, attached to plaintiff's complaint, marked Exhibit "B," contains the following provision:

"It is further agreed, that time shall be and is of essence of this agreement of guaranty, and in the event of any failure or default in any payment hereby guaranteed to be made and of the continuance of such default for a period of ninety days, after written notice thereof to the guarantor in writing, the Traders Trust Company of Oregon, its successors or assigns, may bring a proper action against the guarantor, and in the event of the continuance of such default for a period of one year, after such default shall have been made, then the whole amount covered by this guaranty shall forthwith and without notice become due and payable, at the election of said Traders Trust Co.

"In the latter event the guarantor shall be liable to the Traders Trust Company of Oregon, its successors and assigns, for the principal of the first seven of said

notes and the interest on all of said thirty-two (32) notes down to the time of the entry of judgment thereon, but not in any event including interest longer than to December 7th, 1921, and the Traders Trust Company of Oregon, shall be entitled to judgment for a sum in addition to such principal and interest equal to the then value of the unpaid guaranteed interest on all of said notes, figured on the basis of 5 per cent."

That plaintiff in its complaint in this action is asking and demanding that this Court by its judgment and decree enforce the above mentioned part of this agreement against this defendant, in accordance with the terms thereof. That said portion of said agreement above quoted, and the demand of plaintiff thereunder are usurious, unconscionable and inequitable, and in the nature of a penalty, and not enforceable in a Court of equity.

WHEREFORE, this defendant prays this Honorable Court that this action may be dismissed, that plaintiff take nothing by this action, and that defendant may recover its costs herein expended. And this defendant asks for such other and further relief in the premises as to the Court may seem just and equitable.

BATES, PEER & PETERSON,
Solicitors for Defendant Commonwealth Title Trust
Company, Office and Post Office Address, 1107
Nat'l Realty Bldg., Tacoma, Washington.

EXHIBIT 1.

Know All Men By These Presents, That The Title Insurance & Investment Co., of Tacoma, a corporation duly organized and existing under and by virtue of the laws of the State of Washington with its principal place of business in the City of Tacoma, Washington, and hereinafter designated as the mortgagor, in consideration of the sum of Ninety Thousand (\$90,000.00) Dollars, lawful money of the United States to it in hand paid by the Title Insurance and Investment Company of Washington, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, with its principal office and place of business at Tacoma, in said State, and hereinafter designated as the Mortgagee, the receipt whereof is hereby acknowledged does hereby bargain, sell and convey unto the said mortgagee all and singular the following described personal property in possession of the mortgagor, and situated in the City of Tacoma, County of Pierce and State of Washington, said personal property being fully described in a schedule hereunto attached and marked "Schedule A," it being intended to convey all articles of every name, nature and kind now used in carrying on the abstract business of the mortgagor in said City of Tacoma, and which said "Schedule A" is made a part of these presents.

To Have and To Hold the said personal property and every part and parcel thereof to the said mortgagee, its successors or assigns forever. And the said mortgagor for itself its successors and assigns, covenant that it is the lawful owner of the whole of said personal property set forth in "Schedule A" and has good and lawful right to sell and dispose of the same, and that the said personal property is free and clear of encumbrances of every name, nature and kind.

It is further covenanted and agreed on the part of the mortgagor, that it will at all times hereafter and during the life of this instrument, correctly abstract all deeds, mortgages or other conveyances, mechanics' liens, leases and all miscellaneous records affecting the title to real property in Pierce County or filed for record in the office of the County Auditor of Pierce County; also all judgments and decrees of any Court of Record and all probate matters appearing on the records of any Court of Record in Pierce County in the same manner and with the same accuracy and dispatch that the said work has heretofore been performed by the mortgagee and shall cause same to be bound in appropriate volumes in the same manner as the same now are kept by the mortgagee; and that the said volumes so bound shall be properly numbered and identified with the proper fee numbers plainly printed on the back; that the mortgagor shall keep all the said records taken off and from the records and files of Pierce County properly posted in the records of its office in the said City of Tacoma, that is to say, the land books, lot books, miscellaneous books and filing cards in the same manner as heretofore done by the mortgagee. The mortgagor shall at all times keep on hand a sufficient number of said last named books, and filing cards which shall not be inferior in quality to the same class of books or filing cards heretofore maintained by the mortgagee and further agrees that it will replace any and all records of the office pertaining to the abstract business that may from any cause become lost, mutilated or destroyed.

The Mortgagor hereby covenants and agrees that all additional records, books, plats, maps, files, chains of title, furniture, fixtures or appliances of which it shall become the owner during the lifetime of this instrument and used or intended for use in carrying on the abstract business shall become subject to all the terms of this

mortgage as fully as if they were enumerated therein. Provided, however, that the mortgagor shall have the right to sell and dispose of any article of furniture or appliances that may become useless by reason of wear or breakage and supply the place thereof with new articles of the same kind which said furniture or appliances so supplied shall at once become subject to the lien of this mortgage.

It is further covenanted and agreed on the part of the mortgagor that the mortgagee, its representatives or assigns, shall have authority and power to select a competent person, which person shall be satisfactory to the mortgagor and shall be employed by mortgagor at mortgagee's request whose duty shall be to supervise and control the posting, indexing and care of all of the abstract records hereinbefore described, that come into the abstract office of the mortgagor; and whose duty it shall be to see that all said records are properly posted, bound, indexed and labeled in accordance with the terms of this instrument, and said superintendent shall have the custody of all abstracts of records, papers, plats and everything pertaining thereto, and shall see that they are at all times properly protected from fire, theft and destruction. Said mortgagee shall also have exclusive authority to select all employees of the mortgagor whose duties shall be the indexing, posting, and keeping up the abstract records in the abstract office of the mortgagor, which said employees shall also be satisfactory to the mortgagor and shall be employed by mortgagor at mortgagee's request, and said person selected as above shall supervise the work of said employees, and it shall be his and their duty to keep said abstract plant in such manner as shall at all times correctly show the condition of all titles to real property and all incumbrances or liens thereon in Pierce County, Washington. The compensation of said person and of said employees so employed

shall be paid by the mortgagor. Provided, however, that said person and said employees must be competent and industrious persons and qualify to perform the work assigned him, or to them and in the event that he or they or any of them, shall prove to be incompetent, negligent or disabled from any cause, or unsatisfactory to either party, then such person or employee or employees shall be discharged and another person or employee shall be selected by mortgagee and employed by mortgagor as above provided, and the same rule shall be followed from time to time during the life of this mortgage. Such person or employee shall not be discharged by either party without reasonable notice to the other party in advance. Provided, however, that the said person and the said employees hereinbefore referred to shall at all times in the general conduct of the office and the performance of the labor therein, shall be under the supervision and direction of the manager or superintendent of said mortgagor, and shall perform all duties assigned to them not inconsistent with their duties of keeping up and taking care of said abstract plant as hereinbefore set forth. Said mortgagee shall have the right at any and all times to require from said person full reports as to the posting, indexing and keeping up said abstract plant, and shall have the right at all times to inspect said plant for the purpose of seeing that all the provisions of this mortgage are fully complied with.

The mortgagor further covenants and agrees that it will maintain and operate the said abstract office and plant during the entire life of this mortgage and will make and issue abstracts to customers, solicit business and use its best endeavors to enlarge and build up the business, now carried on by the mortgagee.

The mortgagor further agrees that it will at all times maintain its office in a brick, stone or concrete building and will at all times maintain a fire proof vault of suffi-

cient capacity to keep the current files, all bound books and all loose leaf binders, all card indexes of personal property and miscellaneous records and will cause the same to be placed and kept in said vault at all times when said abstract office is closed for business.

The mortgagor hereby covenants and agrees to keep said personal property hereby mortgaged insured against fire in one or more reasonable insurance companies, to be approved and selected by the mortgagee, in the sum of \$10,000.00 or so much thereof as can be obtained. Loss, if any, payable to the mortgagee as its interest may appear, and upon failure of the mortgagor to so insure said property after five days notice to it, then and in that event the mortgagee may insure the same and pay the premium thereon and the same shall be added to and become a part of this mortgage and secured thereby.

Provided, Notwithstanding if the mortgagor or its successors or assigns shall pay or cause to be paid unto the mortgagee, its successors, assigns or legal representatives, the sum of Ninety Thousand (\$90,000.00) Dollars lawful money of the United States, together with interest thereon at the rate of 7 per cent per annum, principal and interest payable according to the terms of ten promissory notes (or any renewal note or notes which may be taken in lieu of the above notes or any of them to evidence the payment of said sum of money or any part thereof) for the respective amounts and dated and due on or before at the respective times following, to-wit:

\$10,000.00 dated December 7, 1909, due December 7, 1910.

\$5,000.00 dated December 7, 1909, due December 7, 1911.

\$5,000.00 dated December 7, 1909, due December 7, 1912.

\$5,000.00 dated December 7, 1909, due December 7, 1913.

\$5,000.00 dated December 7, 1909, due December 7, 1914.

\$5,000.00 dated December 7, 1909, due December 7, 1915.

\$5,000.00 dated December 7, 1909, due December 7, 1916.

\$5,000.00 dated December 7, 1909, due December 7, 1917.

\$5,000.00 dated December 7, 1909, due December 7, 1918.

\$40,000.00 dated December 7, 1909, due December 7, 1919.

Said notes being payable at Tacoma, Washington, and shall keep and perform all the promises and agreements herein contained, then this mortgage shall be void, and of no effect, and its discharge thereof shall be given by said mortgagee, its successors, assigns or legal representatives, at the request of and at the expense of said mortgagor, otherwise to remain in full force and effect.

But if default be made in the payment of the said promissory notes or any of them or the interest thereon or any part thereof when the same shall become due or if any of said personal property be removed or attempt be made to remove the same or any part thereof be attached, levied upon or claimed by any creditor or creditors of said mortgagor or if said mortgagor shall dispose or attempt to dispose of the same or any part thereof without the written consent of the mortgagee or its successors or assigns, or if the said mortgagor shall fail and neglect to take proper care of any of said property or shall fail or neglect to keep any of the covenants and agreements herein contained, then the whole amount of this mortgage shall at once become due and payable notwithstanding any provision herein to the contrary, and it shall be lawful and said mortgagor hereby authorizes said mortgagee or its agents or attorneys to take pos-

session of all the property mentioned herein wheresoever found, without being deemed guilty of trespassing, and shall foreclose this mortgage and sell the said property pursuant to law, and out of the proceeds of said sale to retain the principal and interest remaining on said notes, unpaid, and all costs of such foreclosure and sale together with the sum of \$500.00 as attorney's fees in addition to the other fees provided for herein which the mortgagor hereby agrees to pay in case any suit or proceedings be had to collect the debt hereby secured or any part thereof and said attorney's fees are hereby secured by this mortgage, if suit be settled before judgment and the excess money, if any there be over and above the sum secured hereby after foreclosure sale shall on demand be paid to the said mortgagor, its successors or assigns.

In Witness Whereof, we have hereunto set our hand and affixed our corporate seal this 7th day of December, 1909.

Title Insurance and Investment Company
of Tacoma,

By A. D. Willoughby,
President.

By A. F. Albertson,
Secretary.

(Corporate Seal)

(Here follows a long inventory which is not material to any question on appeal except the following:)

A set of current files embracing a number of volumes properly numbered and identified with the proper fee numbers thereon, and containing an abstracted copy of all deeds, mortgages, or other conveyances, mechanics' liens, leases, and all miscellaneous records affecting the title to real property in Pierce County, or filed for

record in the office of the County Auditor of Pierce County, up to June 1st, 1909, said records containing information full and complete enough to enable any abstract company to compile an abstract as full and complete as the abstracts made and put out heretofore by the Title Insurance and Investment Company of Washington.

“EXHIBIT 2.”

To the Title Insurance & Investment Company of Tacoma, Washington.

Gentlemen:

In consideration of the agreements which have been this day made between you, the Title Insurance & Investment Company of Washington, the Commonwealth Title Trust Company and The Traders Trust Company of Oregon, we, the undersigned individuals, who are the principal stockholders of the Title Insurance & Investment Company of Washington, and of the Traders Trust Company of Oregon, do hereby covenant and agree that as long as the agreements on your part and on the part of the Commonwealth Title Trust Company and on the part of Fred S. Fogg, Horace Fogg, Franklin Fogg and Herbert H. Gove are kept and performed, we will not, nor will either of us, directly or indirectly, as individuals, or through the medium of any corporation, transact an abstract business or a title insurance business in Pierce County, State of Washington.

IN WITNESS WHEREOF, we have hereunto set our hands this 2nd day of December, A. D. 1911.

A. D. Willoughby,
O. M. Smith.

“EXHIBIT 3.”

The following resolution was introduced by Mr. Fred S. Fogg and seconded by Mr. Franklin Fogg and carried by the unanimous vote of all the stockholders and all of the trustees of the Company:

BE IT RESOLVED, that this company at this meeting of the stockholders and trustees, all the stockholders being present in person or by proxy and all of the trustees being present, in consideration of the advantages and benefits accruing to it and arising out of the transaction and as an inducement to the Traders Trust Company of Oregon to cancel and satisfy of record a certain mortgage now held by them and to extend further time upon a certain indebtedness held by them against The Title Insurance & Investment Company of Tacoma, authorize the president to execute a guaranty of the interest upon 32 certain promissory notes of \$2500.00 each, said notes being made by The Title Insurance & Investment Company of Tacoma in favor of the Traders Trust Company of Oregon, and said notes being of date December second, 1911, and bearing interest at 5 per cent per annum, payable semi-annually, the interest which matures December 7, 1921, and that this company also guarantee for the same consideration the principal of the first seven of said notes.

BE IT FURTHER RESOLVED, that this company for the same consideration execute its mortgage covering the following described real property situated in Tacoma, Washington, to-wit:

Beginning at a point on the northerly side of South Tenth Street, City of Tacoma, distant 80.04 feet westerly of the point of intersection of the northerly line of South Tenth Street with the westerly line of “A” Street in said City of Tacoma, thence northerly and parallel with the westerly line of “A” Street, 125 feet, thence at

right angles westerly 19.69 feet, thence at right angles southerly and parallel with the westerly line of "A" Street, 125 feet thence to the northerly line of said South Tenth Street, thence at right angles easterly to the place of beginning; and

Also a right-of-way in, over and along the following described land situated in the said City of Tacoma, to-wit:

Beginning at a point on the westerly line of "A" Street formed by the intersection of said westerly line of "A" Street with the southerly line of lot 7, block 902, City of Tacoma, thence westerly along the southerly line of lot 7, 120 feet to the easterly line of the alley between said "A" Street and Pacific Avenue, thence at right angles southerly 10 feet, thence at right angles easterly 120 feet to the westerly line of "A" Street, thence at right angles northerly 10 feet to the place of beginning; subject, nevertheless, and reserving to the owners of property adjoining the perpetual right-of-way through and along so much of said land last described in conformity with one certain deed from William C. Bardsley and wife, dated April 5th, 1901, and recorded in book 166 at page 396.

to secure the payment of said seven notes and said interest on said 32 notes to and including December 7, 1921.

BE IT FURTHER RESOLVED, that this company for the same consideration, execute a guaranty to the Traders Trust Company of Oregon that so long as the abstract plant heretofore and now the property of The Title Insurance & Investment Company of Tacoma is held as security for the indebtedness represented by the 32 certain promissory notes of \$2500.00 each made by The Title Insurance & Investment Company of Tacoma in favor of the Traders Trust Company of Oregon of date December 2nd, 1911, being the notes hereinbefore

referred to that this company will correctly abstract or cause to be abstracted all deeds, mortgages or other conveyances, mechanic's liens and all miscellaneous records whether herein specifically mentioned or not affecting the title to real property in Pierce County in the same manner and with the same accuracy and dispatch that the same work has heretofore been performed by the Commonwealth Title Trust Company, and cause the same be arranged according to fee numbers or other system satisfactory to the Traders Trust Company of Oregon, and cause the same to be bound and properly identified, in the customary manner, boxed, wrapped and shipped to or other trustee selected by The Title Insurance & Investment Company of Tacoma and the Traders Trust Company of Oregon, or their successors or assigns according to the terms of a certain agreement of pledge dated December, 1911. PROVIDED, HOWEVER, it shall be agreed in connection with such guaranty that the Traders Trust Company of Oregon shall waive the right to demand such take-offs so long as each and every of the payments of the principal and interest upon said notes and each of them is made at the times specified in said notes and each of them, and so long as each and every of the covenants on the part of The Title Insurance & Investment Company of Tacoma in its agreement of pledge of said date is kept and performed at the times therein agreed, and for a period of one year after default. In the event of such default, and its continuance for one year, however, the Commonwealth Title Trust Company will agree that it will forthwith furnish or cause to be furnished to the Traders Trust Company of Oregon, its successors and assigns, all the take-offs necessary to complete said plant in the manner hereinbefore specified and thereafter so long as said plant or any part of it is held as security for such indebtedness

this company will keep said plant down to date in such manner.

I, Franklin Fogg, Secretary of the Commonwealth Title Trust Company, do hereby certify that the foregoing is a true copy of a resolution duly passed by the stockholders and trustees of the Commonwealth Title Trust Company at a meeting duly called and held, all the trustees and all the stockholders being present, said resolution receiving a unanimous vote.

WITNESS MY HAND and seal of said Company this 2nd day of December, 1911.

Franklin Fogg,
Secretary.

(SEAL)

The answer of the defendant Title Insurance & Investment Company of Tacoma was as follows:

Comes now the above named defendant Title Insurance & Investment Company of Tacoma, reserving all manner of exceptions that may be had to the insufficiencies, uncertainties and imperfections of plaintiff's complaint, and for answer to so much thereof as it is advised is material to be answered.

I.

Denies that any part of the capital stock of Title Insurance & Investment Company of Tacoma, is owned, or ever has been owned by the defendant Commonwealth Title Trust Company.

II.

Denies that Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, are now, or ever have been,

the sole and only owners of the capital stock of the Commonwealth Title Trust Company.

III.

Admits that on or about the 2nd day of December, 1911, defendant Title Insurance & Investment Company of Tacoma, signed the notes set forth in the fifth paragraph of said complaint, and signed the agreement which is attached to said complaint, marked "Exhibit A," but denies that there was a valuable or lawful consideration, or any consideration, for the executing and delivering of said notes and said agreement.

IV.

Admits that on or about the 2nd day of December, 1911, the defendants Commonwealth Title Trust Company, a corporation, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, signed and delivered to the Traders Trust Company of Oregon, a certain paper writing in words and figures as set forth in "Exhibit B," attached to the complaint herein, with the following exception. That the words, "on the part of the individual guarantors" in the twenty-seventh line on the second page of "Exhibit B," were not contained in, and are not a part of the said original writing. That the words "Commonwealth Title Trust Company," were contained in said original writing after the word, "undersigned," in the third line of the third page of said Exhibit "B," attached to the complaint. That instead of the word "they," being the fourth word in the third line on the third page of said Exhibit "B," attached to the complaint, the original writing contained the word "it."

V.

Admits that on or about the 2nd day of December, 1911, the defendant Commonwealth Title Trust Company signed and delivered to the Traders Trust Company of Oregon, the paper writing, a copy of which is attached to the complaint herein marked Exhibit "C," but denies that there was any valuable or lawful consideration therefore.

VI.

Denies that on the 7th day of December, 1914, or at any time, there became due and payable by Title Insurance & Investment Company of Tacoma to the plaintiff, Two Thousand Dollars interest, or any sum, upon the thirty-two notes described in the complaint. Admits that said sum of Two Thousand Dollars, and no part thereof was paid by the Title Insurance & Investment Company of Tacoma, but denies that upon such alleged default that due, or any, notice thereof was within ninety days, or any time, given to the defendant Commonwealth Title Trust Company, and to the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, but admits that said sum of Two Thousand Dollars was not paid by them, or either of them. Denies that there is now due and owing to the plaintiff by defendant Title Insurance & Investment Company of Tacoma as principal, or at all, and by defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, the sum of Two Thousand Dollars, with interest at 5 per cent, from and after December 7th, 1914, or any sum what-

ever. Denies that payment of said sum has been in default more than one year prior to the beginning of this suit, or at all.

VII.

Denies that on June 7th, 1915, or at all, there became due and payable by the Title Insurance & Investment Company of Tacoma to the plaintiff, Two Thousand Dollars interest upon the thirty-two notes aforesaid, or any sum. Admits that said sum and no part thereof was paid by the Title Insurance & Investment Company of Tacoma aforesaid, but denies that upon such alleged default due, or any, notice thereof was given within ninety days, or at any time, to the defendant Commonwealth Title Trust Company, and to the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them. Admits that said sum of Two Thousand Dollars, or any part thereof was not paid. Denies that there is now due and owing to the plaintiff by the defendant Title Insurance & Investment Company of Tacoma, as principal, or otherwise, and by defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, said sum of Two Thousand Dollars, with interest at 5 per cent from and after June 7th, 1915, or any sum.

VIII.

Denies that on December 7th, 1915, there became due and payable by the Title Insurance & Investment Company of Tacoma to plaintiff, Two Thousand Dollars, or any sum, interest upon the thirty-two notes described in the complaint. Admits that said sum of Two

Thousand Dollars, and no part thereof was paid by the Title Insurance & Investment Company of Tacoma, but denies that upon said alleged default due notice, or any notice thereof, within ninety days, or within any time, was given to the defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, but admits that said sum of Two Thousand Dollars, or any part thereof was not paid. Denies that there is now due and owing to the plaintiff by the defendant Title Insurance & Investment Company of Tacoma, as principal, or otherwise, and by defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, said sum of Two Thousand Dollars, with interest at 5 per cent from and after December 7th, 1915, or any sum. Denies that on said December 7th, 1915, the principal, as well as the interest of the first of said thirty-two notes, or any sum, became due and payable by the defendant Title Insurance & Investment Company of Tacoma to the plaintiff, but admits that the sums were not paid. Denies that due or any notice of said alleged default was given to defendants Commonwealth Title Trust Company, and to Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them. Admits that neither or any of them have paid the whole or any part of said principal sum, but denies that there is now due and owing and wholly unpaid from the said Title Insurance & Investment Company as principal, or otherwise, and the defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, as guarantors, or otherwise,

the sum of Twenty-five Hundred Dollars, with interest from and after December 7th, 1915, at 5 per cent, or any sum.

IX.

Admits that the taxes on the real estate described in plaintiff's complaint were not paid, and that certificates of delinquency were issued thereon for the taxes for the years 1912, 1913 and 1914, as set forth in the twelfth paragraph of said complaint, and that the defendant Commonwealth Title Trust is now the owner and holder of said certificates of delinquency, but this defendant specifically denies each and every of the other allegations in said paragraph twelve.

X.

Denies that by the terms of Exhibit "A," it is provided that in event of the failure of defendant Title Insurance & Investment Company of Tacoma to pay the interest on any of its said notes at the time specified therein, and in the event such default shall continue for the period of one year, then the whole of said notes and indebtedness evidenced thereby shall at the option of the said Traders Trust Company of Oregon, or its successors or assigns, forthwith and without notice mature, and that said pledge may forthwith be foreclosed and any interest then in default shall bear interest at the rate of 5 per cent per annum until paid. Denies that payment of any installment of principal has been in default one year or for 90 days, and denies that 90 days notice of any default in payment of any installment of principal has been given.

XI.

Denies that by the terms of the paper writing attached to the plaintiff's complaint, marked Exhibit "B," the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, were to furnish the abstract instruments of record mentioned in the fourteenth paragraph of said complaint, or to keep said records complete and up-to-date, as therein alleged. Denies that the said defendant Commonwealth Title Trust Company, or defendants Franklin Fogg, Horace Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, were in default in that regard, and denies that they, or either of them, have failed and neglected to complete the said records in the manner agreed upon, or in any manner, or in any part whatsoever, and denies that the necessary cost and expense of completing said records and bringing the same down to date is the sum of Ten Thousand Dollars, or any sum whatever.

XII.

Answering paragraph fifteen of said complaint, this defendant denies that the sum of Ten Thousand Dollars is a reasonable sum to allow as an attorney's fee, and included in the judgment and decree rendered herein, but alleges that no greater sum than Fifteen Hundred Dollars should be allowed as attorney's fees in any judgment or decree rendered here in favor of plaintiff.

Second.

And further answering said complaint, and by way of affirmative matter, constituting a first affirmative defense thereto, this answering defendant says:

I.

That plaintiff's bill of complaint does not state facts sufficient to constitute a valid cause of action in equity against this defendant, nor are the facts stated therein sufficient to entitle plaintiff to any relief against this defendant.

Third.

And further answering said complaint, and by way of affirmative matter constituting a second affirmative defense thereto, this answering defendant alleges:

I.

That on December 2nd, 1911, and for a long time prior thereto, defendant Title Insurance & Investment Company of Tacoma, was the owner of, and was engaged in actively operating a complete abstract of title plant, consisting of maps, books and records pertaining to real property titles within Pierce County, Washington, at Tacoma, Washington, and was actively engaged in the business of making and selling abstracts of title to real estate situated exclusively in Pierce County, Washington, and in collecting data and information necessary to the efficient operation of said plant, all of which was in opposition to and in competition with a similar business then, and for a long time theretofore conducted by defendant Commonwealth Title Trust Company, who at said time, and for a long time prior thereto, had been the owner of a similar plant, and who was, and for a long time prior thereto had been engaged as a rival and competitor of said defendant Title Insurance & Investment Company of Tacoma, in the making and selling of

abstracts of title to real estate situate exclusively in Pierce County, Washington, and in collecting the data and information pertaining to real property titles within Pierce County, Washington, necessary and proper to conduct and maintain an efficient abstract plant. That at said time said defendants Commonwealth Title Trust Company and Title Insurance & Investment Company were, and for a long time prior thereto had been doing practically all of the abstract of title business in said Pierce County, Washington, and that defendant Commonwealth Title Trust Company, a corporation, contemplated and intended to continue indefinitely in said business.

That at the time of entering into said agreement set out in plaintiff's complaint, the indebtedness of Title Insurance & Investment Company of Tacoma to Traders Trust Company of Oregon, and the interest on the entire indebtedness of Eighty Thousand Dollars, and the mortgage given to secure the same referred to in the first paragraph of plaintiff's Exhibit "A," were in full force and effect, and that a payment of Five Thousand Dollars on account of the principal and the interest on the entire indebtedness of Eighty Thousand Dollars, were about to become due and payable, and said Title Insurance & Investment Company of Tacoma was unable to pay the same, and had no other assets except said abstract plant, and had so notified said Traders Trust Company of Oregon, the then holder of said indebtedness. That a copy of said mortgage referred to in the first paragraph of said Exhibit "A" is hereto attached marked Exhibit "1," and made a part hereof for all purposes.

That by the terms of said mortgage it was expressly provided that said Title Insurance & Investment Company of Tacoma should maintain and operate the said abstract office and plant mentioned therein during the entire life of said mortgage, and should make and issue abstracts to customers, solicit business and use its best endeavors to enlarge and build up the business then carried on by the mortgagee, all of which was to be done under the supervision of a person designated by said Traders Trust Company of Oregon, and that in the event of a failure by said Title Insurance & Investment Company of Tacoma to pay the interest, or any installment of principal, or any part thereof, said entire indebtedness should at once become due and payable, and said Traders Trust Company of Oregon should have the right to take immediate possession of said entire abstract plant, and sell the same and apply the proceeds to the payment of said entire indebtedness.

That at said time said Traders Trust Company of Oregon, and one A. D. Willoughby and O. M. Smith and Ella Smith, the last three named persons who were the substantial owners and officers of said Traders Trust Company of Oregon, intended and were threatening to take possession of said abstract plant on December 7, 1911, the date when said interest and installment of principal became due, if the same was not paid, and sell the said abstract plant and acquire and operate the same as a going concern, in direct competition with the business carried on by the defendant Commonwealth Title Trust Company in said Pierce County.

That for the sole and only consideration, and for the

sole and only purpose of removing and restraining the rivalry and competition then existing in the abstract business in Pierce County, Washington, and for the sole and only consideration and purpose of inducing said Traders Trust Company of Oregon and Title Insurance & Investment Company of Washington, and said Wilmoughby and Smith and wife, referred to in plaintiff's complaint, and any other person or persons who might become purchasers at the foreclosure sale of said plant and business of said Title Insurance & Investment Company of Tacoma, from engaging in or entering into the abstract business in Pierce County, Washington, in competition with the defendant, Commonwealth Title Trust Company, and for the purpose insofar as possible of giving said defendant Commonwealth Title Trust Company a monopoly of such business within said Pierce County, Washington, and for no other purpose, or consideration, the agreements referred to in plaintiff's complaint were entered into, and in pursuance of said agreements said Traders Trust Company of Oregon took possession of said abstract plant of defendant, Title Insurance & Investment Company of Tacoma, and moved the same to Portland, Oregon, where the same was placed in a secure vault under the joint control of said Traders Trust Company of Oregon, and defendant Title Insurance & Investment Company of Tacoma, to be there kept and not used for any purpose whatsoever during the life of said agreements, and under the conditions therein provided, and said Title Insurance & Investment Company of Tacoma withdrew as a rival and competitor of defendant Commonwealth Title Trust Company in

the abstract business in Pierce County, Washington, and discontinued and abandoned said business. That in pursuance of said agreements said Traders Trust Company of Oregon, and said A. D. Willoughby and O. M. Smith and Ella Smith, his wife, refrained from foreclosing said mortgage and pledge on said abstract plant, and refrained from entering in the abstract business in Pierce County, Washington, thereby giving the defendant Commonwealth Title Trust Company a practical monopoly of the abstract business in Pierce County, Washington, and thereafter the defendant Commonwealth Title Trust Company did practically all of the abstract of title business transacted, and made and sold practically all of the abstracts of title relating to real property that were made and sold in Pierce County, Washington.

That at the time of the making of said agreements of December 2nd, 1911, as herein alleged, and at all times subsequent thereto, the Marion Investment Company referred to in plaintiff's complaint was, and now is, owned and controlled by said A. D. Willoughby and wife.

That concurrent with the execution of said agreements of December 2nd, 1911, and as part of the consideration thereof, and as a part of said transaction, said A. D. Willoughby and O. M. Smith, made, executed and delivered their certain agreement in writing wherein they agree not to transact or engage in the abstract of title business in Pierce County, Washington, during the period covered by said agreements, which said agreement with said Willoughby and Smith is hereto attached

marked Exhibit "2," and made a part hereof for all purposes. That all of said agreements mentioned in said complaint were prepared by said Traders Trust Company of Oregon, A. D. Willoughby and O. M. Smith, and such of said agreements as were executed by the officers of said Commonwealth Title Trust Company, as in this answer alleged, were executed at the instance of said Traders Trust Company, said A. D. Willoughby and O. M. Smith, and pursuant to a resolution of authority therefor prepared by said Traders Trust Company of Oregon, A. D. Willoughby and O. M. Smith, and by them presented to defendant Commonwealth Title Trust Company for adoption, a copy of which said resolution is hereto attached marked Exhibit "3," and made a part hereof for all purposes.

That defendant is advised by counsel, and therefore alleges the facts to be, that said agreements, and each of them, were and are in violation of the Constitution and laws of the State of Washington, and were and are against public policy, illegal and void, and that defendant should not comply with or act under said agreements.

Fourth.

This answering defendant, without admitting any liability whatever upon the agreements, notes and mortgage set out in plaintiff's complaint, and expressly denying the validity and legality of the same, and denying any liability thereunder, and expressly reserving to itself the defenses hereinbefore in this answer interposed, for a partial defense to plaintiff's complaint, alleges:

I.

That the defendant Title Insurance & Investment Company has not been in default in the payment of any installment of principal for one year, and that at the time of the commencement of this action said defendant had not been in default in the payment of any installment of principal for ninety days, and that ninety days notice of any alleged default in the payment of any installment premium had not been given, nor had any notice whatever of any such alleged default been given to the defendant, and that under the terms of the agreement set out in plaintiff's complaint, marked Exhibit "A," plaintiff had no right, power or authority to declare, and could not declare the entire sum evidenced by said notes and agreement to be due and payable, or to foreclose said mortgage or pledge set out in Exhibit "A," or to sue for or recover any part or installment of the principal of said indebtedness.

WHEREFORE defendant prays this Honorable Court that this action may be dismissed, that plaintiff take nothing by this action, and that the defendant may recover its costs herein expended, and this defendant asks for such other and further relief in the premises as to the Court may seem just and equitable.

C. O. BATES,
C. T. PETERSON,
N. H. PEER,
E. FOGG,

Solicitors for defendant Title Insurance & Investment Company. Office and Post Office Address: 1107 National Realty Building, Tacoma, Washington.

Attached to the answer as Exhibits "1," "2," and "3," were Exhibits "1," "2" and "3" of the answer of the Commonwealth Title Trust Company.

STIPULATION.

IT IS STIPULATED by the parties hereto that in addition to facts proven by testimony taken before the Court, the following facts may be taken by the Court as proved by competent evidence, subject to such objection to the materiality or relevancy thereof as either party may raise upon argument. This stipulation shall not be construed to limit the right of either party hereto by direct testimony or upon cross-examination to introduce or to bring out additional or explanatory facts relating to the matters herein stipulated.

I.

Prior to December 7th, 1909, Title Insurance & Investment Company of Washington, a corporation, of which A. D. Willoughby and O. M. Smith and wife were the sole and only stock-holders, owned, maintained and operated in the City of Tacoma, Pierce County, Washington, an abstract business, used and intended to be used for furnishing abstracts of title of property within Pierce County.

Prior to December 7th, 1909, the Commonwealth Title Trust Company, a corporation, of which Horace Fogg, Franklin Fogg, Fred S. Fogg, Herbert H. Gove, Edward Fogg and executors of the estate of Charles S. Fogg, deceased, were the sole stockholders, owned, maintained and operated an abstract plant in the City

of Tacoma, used, and intended to be used, for furnishing abstracts of title to property within Pierce County.

Prior to December 8th, 1909, the Wilson Title & Abstract Company, a corporation, in which R. C. Wilson was substantially the sole stockholder, maintained, owned and operated in the City of Tacoma an abstract business used, and intended to be used, for furnishing abstracts of title to property within Pierce County.

II.

Prior to December 7th, 1909, the aforesaid companies had carried on business in active and actual competition with each other, and for many years prior to said date said companies owned and controlled the only abstract plants in said County, and transacted all of the abstract business therein.

III.

That on the 6th day of December, 1909, the Wilson Title & Abstract Company executed and delivered to A. D. Willoughby, then in the actual management of the Title Insurance & Investment Company aforesaid, and Franklin Fogg, then in the management of the Commonwealth Title Trust Company aforesaid, a lease and option to purchase, a copy of which is hereto attached and marked Exhibit "A," and made a part of this stipulation. That on the 7th day of December, 1909, the said Willoughby by written assignment transferred to said Franklin Fogg, his interest in said lease and option to purchase, a copy of which is attached to the lease Exhibit "A."

IV.

That on the 7th day of December, 1909, the Title Insurance & Investment Co. of Tacoma was organized with the said A. D. Willoughby, A. F. Albertson and F. A. Rice, as incorporators; the capital stock of said corporation being \$5000.00 divided into fifty shares of the par value of One Hundred (\$100.00) Dollars each; that said Willoughby subscribed for forty-eight (48) shares, and Albertson for one share, and Rice for one share; that stock certificates were duly issued on said date to said persons for said amounts of stock; that on said date, defendants, Fred S. Fogg and Franklin Fogg, made, executed and delivered to the said Willoughby an instrument in writing, a true copy of which is in words and figures following:

“THE TACOMA.

Tacoma, Wash., Dec. 7, 1909.

In consideration of One Dollar and other good and valuable considerations, we and each of us hereby promise and agree to indemnify and save harmless A. D. Willoughby from any and all loss, liability or expense because of or by reason of his subscription for forty-eight shares of the capital stock of The Title Insurance & Investment Co. of Tacoma on Dec. 7, 1909.

Fred S. Fogg,
Franklin Fogg.”

That on said date the Title Insurance & Investment Company of Washington conveyed to said Title Insurance & Investment Company of Tacoma its entire abstract plant and property for the total purchase price of One Hundred Thousand Dollars, payable Ten Thou-

sand Dollars in cash, and the balance Ten Thousand Dollars in one year, and Five Thousand Dollars each year thereafter, excepting that the final payment was to be Forty Thousand Dollars, and said Title Insurance & Investment Company of Tacoma paid said Ten Thousand Dollars in cash, and executed and delivered to Title Insurance & Investment Company of Washington its promissory notes for the deferred payments amounting to Ninety Thousand Dollars, and executed and delivered to secure the same its mortgage on said abstract plant property, which is set out in Defendants' Answer and marked "Exhibit 1."

That on said December 7th, 1909, Commonwealth Title Trust Company executed and delivered to Title Insurance & Investment Company of Tacoma its bill of sale to certain abstract records, a copy of said bill of sale is attached hereto marked "Exhibit B," and made a part hereof for all purposes, which property was included in and became a part of the said chattel mortgage aforesaid.

That on the same date Commonwealth Title Trust Company and Title Insurance & Investment Company of Tacoma, and Title Insurance & Investment Company of Washington made, executed and delivered to each other their certain agreement dated December 7th, 1909, a copy of which is attached hereto marked "Exhibit C," and made a part hereof.

That on December 30th, 1909, the said stock certificates in said Title Insurance & Investment Company of Tacoma were endorsed and surrendered by said Wiloughby, Albertson and Rice, and the same were duly

issued to Horace Fogg, Franklin Fogg, Edward Fogg, Herbert H. Gove, Fred S. Fogg and D. I. Fogg, for all of the capital stock of said company, and said stock remained so held until the commencement of this action, and the par value of said stock was afterward duly paid by said stockholders to said Title Insurance & Investment Company of Tacoma.

V.

That at all times mentioned in the complaint and in the answer, the said A. D. Willoughby and O. M. Smith and his wife, were the officers and sole stockholders of the Traders Trust Company of Oregon, the corporation mentioned in said pleadings,

That at all times mentioned in the pleadings in this case A. D. Willoughby and Marian Willoughby, his wife, were the officers and owners and holders of all of the stock of the Marion Investment Company, the corporation mentioned and referred to in said pleadings.

VI.

That on July 22nd, 1911, said Horace Fogg wrote and mailed to the said Willoughby, and said Willoughby received the following letter:

“Tacoma, Washington, July 22nd, 1911.

Mr. A. D. Willoughby,
Portland, Oregon.

Friend Willoughby:—

The abstract business is now so poor that some new plan must be made, as there is not enough business to even pay the running expenses of the two plants, and in addition to that, the new man is coming into active

competition and must be headed off before he has a chance to build up a good plant. If you will give us your share of help, we will still try to pull the thing out OK, as almost any revenue derived will be more than could be had by fighting him and each other too. After considering a good many plans, this one seems to be the best.

That is, increase the capital stock of our company to four hundred thousand dollars, give you \$80,000, and Wilson \$38,000 preferred stock at 5 per cent, in exchange for your plants, then operate only our plant and as soon as the amount of work increases any, to cut the rate to seventy-five cents and later to fifty cents, if necessary to keep a clear field. This plant could easily do several times the total abstract business to be done and we could make more money for us all by operating one plant at reduced rates than to keep the rates up and let the new man build up a plant out of his profits, and I am sure that low abstract rates will keep out competition better than several companies at higher rates would do. At a dollar, the new man would make a little profit on each order, but 75 cents he would lose a little on each order, and no one outside of ourselves can make abstracts at less than a dollar and make a cent of profit. We could do it because our plant is so complete and we have such a large amount of stock on hand.

By making your stock preferred, you will get your dividends before we get anything at all and will relieve you from all worry or danger of having your plant back on your hands. You would also be able to sell this stock or use it as security much better than you can your present mortgage. We would want to put in some clause giving the company the right to retire preferred stock at certain times and in certain amounts. Kindly take up this plan with Mr. Smith and drop me a line as to what

you think of it and also send any suggestions you may think of as to any better way. Our interests here are mutual and must be worked out together or both plants would be operated at a loss, for the benefit of the public.

Our idea would be to work into title certificates as fast as possible and use every effort to put new additions under the certificate system, and once under a certificate, that addition would be out of reach of any other company. By working for the first few years to keep the field clear rather than to make anything more than interest on the investment, we would have in the course of five or ten years, a business that would be almost out of the line of competition, both on account of the cost of another plant and by that time, we would have a large part of the titles under a certificate system.

Yours truly,

Horace Fogg."

That on August 3rd, 1911, said Horace Fogg wrote and mailed to said Willoughby, and said Willoughby received the following letter:

"Tacoma, Washington, August 3rd, 1911.

Mr. A. D. Willoughby,
Portland, Oregon.

Dear Mr. Willoughby:—

I am afraid our ideas are too far apart to do us any good. The situation here is so bad that we must have some relief or drop out of our present deals. The plan you suggested would not relieve us any, but would in fact make it far more binding on us, and if we are not able to make enough money to pay the amounts due under the present plan, we would not be able to do so under your plan.

I tried to figure out some plan that would ease us up and at the same time place you in a better and more secure position, and I think the plan suggested by me would do that. You cannot expect to be paid any thing, when both plants are not making anything, but under my scheme, you would get your five per cent interest from the combined earnings before we would get a cent for ourselves, and your principal would be absolutely secure, which to my mind would be a much better situation for you than the present one, although your rate of interest would be a little less than the present speculative one.

Whether or not any deal is made with you or Wilson, the rate will have to be cut to seventy-five cents and we expect to do that at once and with the intention of making it a permanent rate. We can pay expenses at fifty cents if we get most of the business, and both Frank and Mr. Gove thought it the best plan to come back to our own company and make a permanent rate of fifty cents and not try to buy the other plants as long as there was a fourth man in the field whom we had to fight anyway, but I thought I would take it up with you first and get your ideas on the matter before we did anything. It may be that as you are now footloose, you will want to come back here and enter the abstract field again, but with so little work to be done, we could each leave one stenographer in the office to do the work and the rest of the force go out after the four or five orders a day that could be dug up.

If you come up this way, you might drop in and we could talk over the situation anyway.

Yours very truly,

Horace Fogg."

That on August 7th, 1911, said Willoughby wrote and Horace Fogg received the following letter:

“Portland, Oregon,
221 Commercial Club Bldg.,
August Seventh
1911

Mr. Horace Fogg,
109 South 10th Street,
Tacoma,
Wash.

Dear Sir:

Your letter of August third relative to the Abstract situation at Tacoma has been received.

We understand the condition of the abstract business in Tacoma and are ready to give our assistance to any proposition that will relieve the situation, provided our interests are fully protected. Would rather take the plant back and operate it than to go into a proposition whereby we would be a minority stockholder and therefore have nothing to say in the management of the company.

I expect to be in Tacoma within the next two weeks and will then talk over with you any scheme you may have that will be of mutual benefit to us all. You might bear in mind this fact and that is if we merge the plants as suggested in your letter, our interests must be protected by a guarantee of some kind.

Very truly yours,

A. D. Willoughby.

Dictated by AW/C.

VII.

On December 2nd, 1911, a certified copy of a record of the Title Insurance & Investment Company of Tacoma was received by the Traders Trust Company in words and figures as follows:

"Be it resolved that the Title Insurance & Investment Company of Tacoma execute and deliver thirty-two certain notes dated December 2nd, 1911, in favor of the Traders Trust Company of Oregon for twenty-five hundred dollars each, the first payable on or before December 7th, 1915, and one payable on or before December 7th each year thereafter, with interest at the rate of five per cent per annum, payable semi-annually, and execute and deliver an agreement of pledge of the property and plant of the company to secure said notes; said notes and agreement to be in such form and to contain such provisions as the president of the company may agree upon, and that the president and secretary be authorized to execute said agreement and that the president be authorized to execute said notes.

"I, Jesse Thomas, secretary of Title Insurance & Investment Co. of Tacoma, do hereby certify that the foregoing is a true copy of a resolution duly passed by the trustees of said company at a meeting duly called and held on the 2nd day of December, 1911, a quorum being present, and that the same appears on the minutes of said meeting.

"Witness my hand and the seal of said company this 2nd day of December, 1911.

"(Sig.) Jesse Thomas."

(Corporate seal.)

On December 2nd, 1911, a certified copy of a record of the Commonwealth Title Trust Company was received by the Traders Trust Company of Oregon, in words and figures as follows:

"The following resolution was introduced by Mr. Fred S. Fogg and seconded by Mr. Franklin Fogg and carried by the unanimous vote of all the stockholders and all of the trustees of the company:

"**BE IT RESOLVED**, that this company at this meeting of the stockholders and trustees, all the stockholders being present in person or by proxy, and all of the trustees being present, in consideration of the advantages and benefits accruing to it and arising out of the transaction and as an inducement to the Traders Trust Company of Oregon to cancel and satisfy of record a certain mortgage now held by them and to extend further time upon certain indebtedness held by them against the Title Insurance & Investment Company of Tacoma, authorize the president to execute a guaranty of the interest upon 32 certain promissory notes of \$2500.00 each, said notes being made by the Title Insurance & Investment Company of Tacoma in favor of the Traders Trust Company of Oregon, and said notes being of date December second, 1911, and bearing interest at 5% per annum, payable semi-annually the first maturing December 7, 1915, down to and including the interest which matures December 7, 1921, and that this company also guarantees for the same consideration the principal of the first seven of said notes.

"**BE IT FURTHER RESOLVED**, that this company for the same consideration execute its mortgage covering the following described real property situated in Tacoma, Washington, to-wit:

"Beginning at a point on the northerly side of South Tenth Street, City of Tacoma, distant 80.04 feet west-

erly of the point of intersection of the northerly line of South Tenth street with the westerly line of 'A' street in said City of Tacoma, thence northerly and parallel with the westerly line of 'A' street, 125 feet, thence at right angles westerly 19.69 feet, thence at right angles southerly and parallel with the westerly line of 'A' street 125 feet to the northerly line of said South Tenth street, thence at right angles easterly to the place of beginning.

"And also a right-of-way in, over and along the following described land situated in the said city of Tacoma, to-wit:

"Beginning at a point on the westerly line of 'A' street formed by the intersection of said westerly line of 'A' street with the southerly line of lot 7, block 902, city of Tacoma, thence westerly along the southerly line of lot 7, 120 feet to the easterly line of the alley between said 'A' street and Pacific avenue, thence at right angles southerly 10 feet, thence at right angles easterly 120 feet to the westerly line of 'A' street; thence at right angles northerly 10 feet to the place of beginning; subject, nevertheless, and reserving to the owners of property adjoining the perpetual right-of-way through and along so much of said land last described in conformity with one certain deed from William C. Bardsley and wife, dated April 15, 1901, and recorded in book 166 at page 396, to secure the payment of said seven notes and said interest on said 32 notes to and including December 7, 1921.

"BE IT FURTHER RESOLVED, that this company for the same consideration, execute a guaranty to the Traders Trust Company of Oregon that as long as the abstract plant heretofore and now the property of the Title Insurance & Investment Company of Tacoma, is held as security for the indebtedness represented

by the certain promissory notes of \$2500.00 each made by the Title Insurance & Investment Company of Tacoma in favor of the Traders Trust Company of Oregon of date December 2nd, 1911, being the notes hereinbefore referred to, that this company will correctly abstract or cause to be abstracted all deeds, mortgages or other conveyances, mechanics' liens and all miscellaneous records whether herein specifically mentioned or not affecting the title to real property in Pierce County, in the same manner and with the same accuracy and dispatch that the same work has heretofore been performed by the Commonwealth Title Trust Company, and cause the same to be arranged according to fee numbers or other system satisfactory to the Traders Trust Company of Oregon, and cause the same to be bound and properly identified in the customary manner, boxed, wrapped and shipped to ———, or other trustees selected by the Title Insurance & Investment Company of Tacoma and the Traders Trust Company of Oregon, or their successors or assigns according to the terms of a certain agreement of pledge dated December 2nd, 1911, PROVIDED, HOWEVER, it shall be agreed in connection with such guaranty that the Traders Trust Company of Oregon shall waive the right to demand such take-offs so long as each and every one of the payments of the principal and interest upon said notes and each of them is made at the times specified in said notes, and each of them, and so long as each and every of the covenants on the part of the Title Insurance & Investment Company of Tacoma in its agreement of pledge of said date is kept and performed at the times therein agreed, and for a period of one year thereafter. In the event of such default, and its continuance for one year, however, the Commonwealth Title Trust Company will agree that it will forthwith furnish or cause to be furnished to the Traders

Trust Company of Oregon, its successors and assigns, all the take-offs necessary to complete said plant in the manner hereinbefore specified and thereafter so long as said plant or any part of it is held as security for such indebtedness this company will keep said plant down to date in such manner.

"I, Franklin Fogg, secretary of the Commonwealth Title Trust Company, do hereby certify that the foregoing is a true copy of a resolution duly passed by the stockholders and trustees of the Commonwealth Title Trust Company at a meeting duly called and held, all the trustees and all the stockholders being present, said resolution receiving a unanimous vote.

"WITNESS MY HAND and seal of said company this 2nd day of December, 1911.

"Franklin Fogg,

(Corporate seal)

Secretary."

VIII.

The payments of interest provided for in the several agreements set forth in the plaintiff's bill and marked Exhibits "A," "B" and "C," accruing June 7th, 1912; December 7th, 1912; June 7th, 1913; December 7th, 1913, and June 7th, 1914, each in the sum of \$2000.00, were paid substantially at the time agreed upon, each and every of said payments being made by check of the Commonwealth Title Trust Company, to the Lumbermen's Trust Company, plaintiff in this suit.

With reference to the payment of interest due June 7th, 1913, the following correspondence was had:

“COMMONWEALTH TITLE TRUST
COMPANY,

Tacoma, Washington, June 5th, 1913.

Traders Trust Company of Oregon,

Portland, Oregon.

Gentlemen:

On June 7th, there will be due you from the Commonwealth Title Trust Company, two thousand dollars interest on certain payments guaranteed by this company. On account of the poor condition of the abstract business, we are now unable to make this payment, but expect to be able to take care of all or most of it within the next sixty or ninety days.

In order to straighten up the finances of the company, we have cut the salaries of the three highest right in two, and have also arranged to lay each employee off for one month during the next four months. On December first we will be free of the Wilson lease, so all of these cuts in expenses will enable us to catch up with our payments once more. I am very sorry to have any delay in this payment, but the total abstract business gradually drops down until it's a struggle to pay running expenses, but we have the situation well in hand now and will forward payments as soon as possible.

Yours very truly,

Commonwealth Title Trust Company,

(Signed) Horace Fogg, President.”

“COMMONWEALTH TITLE TRUST
COMPANY,

Tacoma, Washington, August 1st, 1913.

Mr. A. D. Willoughby,

Portland, Oregon.

Dear Willoughby:

If you will be here on the 7th or 8th of this month

I will have at least a thousand dollars for you, and want to talk over another matter with you at the same time. We lost our tax case but have not yet decided about the appeal.

As to these assessments, Champlain reports with another one against the unplatted piece adjoining the lots.

Yours very truly,

(Signed) Horace Fogg."

IX.

With reference to the payment of interest of December 7th, 1914, and subsequent instalments of interest or principal, the following correspondence was had:

(1) From Lumbermen's Trust Co. to Commonwealth Title Trust Company:

"Portland, Nov. 30, 1914.

Gentlemen:

On December 7th interest to the amount of \$2000 will be due on the \$80,000 of notes of the Title Insurance & Investment Company, which we hold in escrow. Your prompt attention to the matter will be appreciated.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(2) From Lumbermen's Trust Co. to Commonwealth Title Trust Company:

"Dec. 9, 1914.

Gentlemen:

The \$2000 interest due on the \$80,000 notes of the Title Insurance & Investment Company payable December 7th, has not been received by us. Kindly advise when we may expect it.

Yours truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(3) From Commonwealth Title Trust Co. to Lumbermen's Trust Company:

"December 10th, 1914.

Gentlemen:

We are this morning in receipt of your letter relative to interest, etc., and thank you for same. We have been expecting to write you for several days, but were waiting to see how matters were coming out with us.

We are unable to send you the money at the present time, but hope to send you \$1000 on or about January 1st, and the balance a little later. We are sorry that we cannot meet this promptly, but conditions will not permit.

Thanking you for your courtesy, we are,

Yours truly,

Commonwealth Title Trust Company,

By Franklin Fogg, Manager."

(4) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

"Dec. 12, 1914,

Gentlemen:

We are in receipt of yours of the 10th relative to your being unable to meet the interest which was due December 7th. We have so notified the parties concerned.

Yours very truly,

W. S. Hallenbeck,

Asst. Sec'y."

(5) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

"Jan 7th, 1915.

Gentlemen:

Referring to yours of December 10th. We have not yet received a remittance from you in connection

with the escrow which we hold. When may we expect it? We are receiving inquiries every day or so.

Yours very truly,

Lumbermen's Trust Company,

W. A. Hallenbeck,

Asst. Sec'y."

(6) From Commonwealth Title Trust Co. to Lumbermen's Trust Co.:

"Jan. 11th, 1915.

Gentlemen:

Regarding your Traders Trust Company escrow, we hoped to be able to pay part of the interest by the 10th of this month, but business has been so quiet that we are unable to do so, and we are turning most of our outstanding accounts over to a collection agency in the hopes of getting in enough money to clean up the payment within the next thirty to sixty days.

Yours very truly,

(Signed) Horace Fogg,
President."

(7) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

"Jan. 12th, 1915.

Gentlemen:

We beg to acknowledge receipt of your letter of the 11th, and have notified the parties concerned regarding your inability to pay the interest due on the 10th until thirty to sixty days later. Yours truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(8) From Lumbermen's Trust Co. to Commonwealth Title Trust Co., by registered letter, receipt of which is acknowledged:

"March 2nd, 1915.

Gentlemen:

Referring to our notice of November 30th, 1914, that on December 7th, 1914, interest to the amount of \$2000 would be due on the \$80,000 of notes of the Title Insurance & Investment Company, which we hold in escrow.

Up to the present time we have received no funds from you in payment for this interest. We would therefore call your attention to the fact that according to the terms under which these notes are held by us in escrow, the interest will be in default on March 7th, i. e., ninety days from December 7th, 1914.

Kindly advise us if the interest will be forthcoming before March 7th.

Yours very truly,

W. H. Hallenbeck,
Asst. Sec'y."

(9) From Lumbermen's Trust Co. to the Title Insurance & Investment Company, by registered letter, receipt of which is acknowledged by the Commonwealth Title Trust Co. (See Item 10):

"March 9th, 1915.

Gentlemen:

Herewith please find copy of our letter to the Commonwealth Title Trust Company, also copy of our letter to the beneficiaries referred to therein, relative to the interest which is in default on the \$80,000 of notes of your company.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(10) From Lumbermen's Trust Company to Commonwealth Title Trust Company, by registered letter, receipt of which is acknowledged:

"March 9th, 1915.

Gentlemen:

This is to formally advise you, that the interest amounting to \$2000, due December 7th, 1914, on the \$80,000 notes of the Title Insurance & Investment Company, which we hold in escrow, is now in default, the ninety days of grace having expired.

We beg to inform you that we expect to ask the beneficiaries to take the legal steps to which they are entitled, in order to protect their interest.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(11) From Lumbermen's Trust Co. to Commonwealth Title Trust Company:

"March 22nd, 1915.

Gentlemen:

We have had no advices from you as to the interest which is in default on the \$80,000 of notes of the Title Insurance & Investment Company, about which we wrote you on March 9th.

We will be pleased to hear from you as to what your prospects are of a settlement, other than through legal means.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(12) From Lumbermen's Trust Co. to Title Insurance & Investment Company (See Item 13) :

"May 19th, 1915.

Gentlemen:

We are sending you herewith for your information, a copy of a letter which we have today addressed to the Commonwealth Title Trust Company of Tacoma, Wn., with reference to the semi-annual interest due on June 7th, on the \$80,000 of notes of your company, which we hold in escrow.

Yours very truly,

W. H. Hallenbeck,
Asst. Sec'y."

(13) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

"May 19th, 1915.

Gentlemen:

On June 7th the semi-annual interest to the amount of \$2000 will be due on the \$80,000 of notes of the Title Insurance & Investment Company, which we hold in escrow.

Your prompt attention to this matter will be appreciated.

We would also call your attention to the fact that thus far no remittance has been received by us to cover a like amount of interest due on the last semi-annual interest date, which is December 7th, 1914.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(14) From Lumbermen's Trust Co. to Title Insurance & Investment Co. (See Item 15):

"June 8th, 1915.

Gentlemen:

Please find enclosed copy of a letter which we are today addressing to the Commonwealth Title Trust Company, relative to the unpaid interest due December 7th, 1914, on the \$80,000 of your notes which we hold in escrow, and in connection with the payment due on June 7th.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(15) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

"June 8th, 1915.

Gentlemen:

Referring to our notice of May 19th, to the effect that on June 7th interest to the amount of \$2000 would be due on the \$80,000 of notes of the Title Insurance & Investment Company which we hold in escrow.

Up to this writing no funds have been received.

In our letter we also called attention to the fact that thus far no remittance has been received by us to cover a like amount due on the last semi-annual interest date, namely, December 7th, 1914.

We would appreciate an early reply from you as to the present status of this matter.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(16) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

"June 24th, 1915.

Gentlemen:

Will you kindly advise us by return mail the status of the interest payments due on December 7th, 1914, and June 7th, 1915, about which we wrote you on June 8th.

As this matter is held by us in escrow we are at least entitled to the courtesy of a reply.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(17) From Lumbermen's Trust Co. to Title Insurance & Investment Co. (See Item 18):

"November 9th, 1915.

Gentlemen:

We are sending you herewith for your information, a copy of a letter which we have today addressed to the Commonwealth Title Trust Company of Tacoma, Wash., with reference to the semi-annual interest due on December 7th, on the \$80,000 of notes of your company which we hold in escrow.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(18) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

"November 9th, 1915.

Gentlemen:

On December 7th the semi-annual interest to the amount of \$2000 will be due on the \$80,000 of notes

of the Title Insurance & Investment Company, which we hold in escrow. Your prompt attention to this matter will be appreciated.

We would also call your attention to the fact that thus far no remittance has been received by us to cover a like amount of interest due on the last two semi-annual interest dates, which were June 7th, 1915, and December 7th, 1914.

Yours very truly,
(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(19) From Lumbermen's Trust Co. to Title Insurance & Investment Co.:

Gentlemen:

"November 24th, 1915.

The first note issued by you to the Traders Trust Company, of Portland, Ore., and one of a series of thirty-two notes, will be due and payable on December 7th, 1915.

As trustee of these notes for the Traders Trust Co. we ask that payment be made directly to us.

Yours very truly,
(Signed) W. H. Hallenbeck,
Trust Department."

(20) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

Gentlemen:

"November 24, 1915.

We enclose herewith copy of letter to the Title Insurance & Investment Company of Tacoma, with reference to the payment of their note, due December 7th, 1915. Inasmuch as you are guarantor of the first seven notes, of the issue of which this is one, we feel that you should be notified of the maturity thereof.

Yours very truly,
W. H. Hallenbeck,
Asst. Sec'y."

(21) From Lumbermen's Trust Co. to Title Insurance & Investment Co.:

Gentlemen: "December 8th, 1915.

We regret to state that no remittance has been received from you to take up your note in favor of the Traders Trust Company of Portland, which was due on December 7th, 1915. We have sent this information to the beneficiaries of the trust, and shall follow their requests for placing this matter on a more satisfactory basis. Yours very truly,

W. H. Hallenbeck,
Trust Department."

(22) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

Gentlemen: "December 8th, 1915.

We regret to state that the semi-annual interest to the amount of \$2000 and the \$2500 for the payment of the note due from the Title Insurance & Investment Company of Tacoma, on December 7th, 1915, have not been received.

We have given information of this default to the beneficiaries of the trust, and await their requests for placing the matter on a more satisfactory basis.

Yours very truly,

(Signed) W. H. Hallenbeck,
Trust Department."

ROBERT M. DAVIS,
FRANK H. KELLEY,
JOHN H. HALL,

Counsel for Plaintiff.

BATES, PEER & PETERSON,
Counsel for all the Defendants.

Exhibit "A."

THIS AGREEMENT, made and executed in duplicate this 6th day of December, A. D. 1909, by and between Wilson Title & Abstract Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, the party of the first part, hereinafter referred to as "said company," and Franklin Fogg and A. D. Willoughby, their legal representatives and assigns, parties of the second part, hereinafter referred to as "second parties." WITNESSETH:

Paragraph 1. For and in consideration of the covenants and agreements hereinafter set forth to be kept and performed by second parties, said company hereby leases to said parties of the second part, their legal representatives and assigns, the entire abstract plant, books, records, files, and property of said company now situated in the county court house at Tacoma, Pierce County, Washington, more fully but not exclusively, described in the schedule annexed hereto marked Schedule A, and made a part hereof, together with all additions, improvements and increase thereof hereinafter provided for, for the period of five years from the date hereof, at the monthly rental of three hundred and sixteen dollars and sixty-five cents (\$316.65), in addition to the expense of maintaining said plant as hereinafter provided, payable on or before the 6th day of each and every month during said period, at the Fidelity Trust Company Bank, at Tacoma, Washington, which said rental of \$316.65 per month and said expense of maintainance said second parties agree to pay according

to the terms of this agreement, and each and all of said sums of \$316.65 remaining unpaid after the same shall have become payable as herein provided shall bear interest at the rate of ten per cent per annum; **PROVIDED**, that if said second parties shall exercise the option herein granted and shall purchase said plant within the time provided therefore and shall pay and discharge all the monthly payments due and payable up to the time of such purchase, then from the time of such purchase said second parties shall not longer be required to pay said monthly sum of \$316.65, but from said time of buying shall pay the purchase price and the instalments thereof, all as hereinafter set forth and provided, together with the cost and expense of keeping up and maintaining said plant as herein provided.

Paragraph 2. For the same consideration said company hereby grants unto said second parties, their legal representatives and assigns, the right and option to buy from said company at any time prior to the 6th day of December, A. D. 1911 (one thousand nine hundred and eleven), the said entire abstract plant, books, records and files, including the additions, improvements and increase, hereinafter provided for, at and for the price of thirty-eight thousand (\$38,000) dollars, payable as follows:

\$5000 in cash at the time of exercising said option and purchasing said plant (which time is hereinafter referred to as "the time of buying");

\$5000 on or before one year after said time of buying;

\$5000 on or before two years after said time of buying;

\$5000 on or before three years after said time of buying;

\$5000 on or before four years after said time of buying;

\$5000 on or before five years after said time of buying;

\$5000 on or before six years after said time of buying; and

\$5000 on or before seven years after said time of buying; all deferred payments to bear interest from said time of buying until paid, at the rate of six per cent per annum, payable quarterly, all of said sums both of principal and interest to be paid at the Fidelity Trust Company Bank at the City of Tacoma, said deferred payments and each and all of them and every part of the unpaid purchase price of said plant to be secured by mortgage of said entire plant, books, records and files, including the additions, improvements, and increase hereinafter provided for, and also to be further secured by additional high-class collateral or other security to the amount of fifteen thousand dollars, satisfactory to said company, said mortgage to contain, besides the usual provisions of chattel mortgages, the provision (a) that in case of failure to pay any portion of the principal or interest when the same shall become due and payable, or in case of the failure on the part of second parties to keep and perform any of the covenants or agreements herein set forth to be by them kept and performed, then the whole of the principal sum shall immediately become due and payable at the option of said company; (b) that in case any action or proceeding be had or commenced for the foreclosure of said mort-

gage a reasonable attorney fee shall be included in the judgment or added to the amount due or payable under the terms of said mortgage, and (c) the provisions, stipulations, and conditions of this agreement so far as the same relate to said option and sale and the keeping up and maintainance of said abstract plant.

Paragraph 3. It is further agreed that for and during said period of five years from the day of the execution hereof, or in case said second parties shall exercise said option and purchase said plant prior to said 6th day of December, A. D. 1911, then from the date of this agreement up to the time of buying, and from the time of buying up to the time when the last and final payment, and complete payment, of the full amount of said purchase price with the interest thereon, shall have been made according to the terms of this agreement, said plant shall be kept up and maintained at the cost and expense of said second parties, as follows:

(a) The current files in the office of the county auditor, county clerk, etc., shall be "taken off" in the manner in which such files have been heretofore taken off by said company, or as taken off by the Commonwealth Title Trust Company, the files in the county auditor's office to be taken off daily.

(b) The take-off slips or sheets shall be posted and checked in the property indexes and the alphabetical indexes of said plant immediately or within a reasonable time after the same shall have been taken off, and such posting and checking shall be done in the manner heretofore followed by said company in keeping up and maintaining said plant.

(c) Such files shall be taken off and such posting and checking shall be done by a person or persons necessary to perform such work, satisfactory to and selected by said company, and such person or persons shall be of the same general quality, ability and experience, as far as practicable, as the persons heretofore and now employed by said company in such work, and shall be paid salaries no lower and no greater than the salaries now paid by said company, unless by consent of all parties hereto.

(d) Unless the persons employed in so taking off and posting shall include a man, then a man or boy satisfactory to said company, shall be employed especially to take the books out of the vault in the mornings and return the same to the vault in the evenings.

(e) Said company shall control the work of taking off and posting and checking during said period of five years, or in case second parties shall exercise said option to purchase, then down to the time of exercising said option to buy, if the same be exercised, but no officer, trustee or stockholder of said company shall be required to give such work his time or more than a general supervision, and shall receive no compensation from said second parties therefor, but nothing in this subdivision shall be construed to affect the provision that during the entire life of this contract said plant shall be kept and maintained as in said paragraph 3 and all subdivisions thereof; provided, said company and its officers shall have the right to examine and inspect all and every part of said plant, and the additions, improvements, and increase, at all times during the life of this lease, and

until said purchase price shall have been fully paid, in case said option to buy shall be exercised.

(f) A suitable room (or rooms) shall be procured and maintained with sufficient heat and light and with a satisfactory vault for the protection of the books, all to be selected by or to be satisfactory to said company, but at a cost not to exceed \$150 per month. It is understood that the plant shall remain in its present quarters, or similar quarters, at the county court house, under the present arrangement therefor, or a similar arrangement, as long as possible or practicable.

(g) Said plant shall be insured by said company, at said second parties expense, against loss by fire, in the sum of at least \$10,000, or so much thereof as can be obtained with reasonable effort, with loss if any payable to said company as its interest may appear, and said insurance shall be maintained continuously during the whole term of this contract.

(h) Down to the time of exercising said option, said company is hereby authorized by second parties to employ all necessary help, rent quarters, procure necessary fir fixtures, and remove the plant when necessary, to negotiate insurance, and to incur such expense for stationery and other matters in connection with the keeping up and maintainance of said plant, all as provided in said paragraph 3.

(i) Said second parties shall pay the salaries of the persons employed in the work above mentioned, and also the rent of the room and vault above mentioned, and such payment shall be made monthly on or before the 12th day of each calendar month. Said second par-

ties shall also pay all taxes assessed against said plant, or against any person, firm or corporation, on account of said plant, and such payment of taxes shall become due and payable, provided that said company shall pay the taxes for the year 1909, being due and payable in February, 1910, and second parties, upon the termination of this agreement shall pay or secure to be paid all of the taxes on said plant for the year in which the contract shall so terminate (as well as all prior taxes) whether said taxes for said year shall be then due or payable or not; said second parties shall also pay all premiums upon insurance obtained upon said plant, and all cost and expense of removing said plant and of fitting up new quarters, as aforesaid, if such removal be necessary or desirable, and all the cost of paper, binders, blanks and other stationery and supplies as may be necessary to be procured in keeping up and maintaining said plant in the same manner as heretofore.

(j) If second parties shall fail to make payment for help, rent, taxes, insurance premiums or other expenses mentioned in this paragraph when the same shall be due and payable, then said company may pay such expenses and the amount or amounts thereof shall be due and payable forthwith from said second parties to said company and shall be secured as other amounts or payments or installments of purchase price payable under this contract are secured, and the failure of said second parties to pay any amount due for help, rent, taxes, insurance premiums or other expenses shall have the same effect as a default in the payment of any other sum, amount, or installment payable under the pro-

visions of this agreement, provided that no default be claimed on account of the failure to pay any of the expenses mentioned in this paragraph 3 until five days after a bill or statement of such expenses shall have been presented to Franklin Fogg or A. D. Willoughby, or left for them at 109 South Tenth street, at Tacoma, Wash., or at Fidelity Trust Company Bank in said city.

Paragraph 4. It is agreed by the parties hereto that said company shall remain in the exclusive possession of said abstract plant for the purpose of taking care of the same and of keeping up and maintaining the books, files, indexes, records, and other documents thereof as provided in paragraph 3, down to the time when said second parties shall exercise the option to purchase said plant given above, in case they do exercise the same, said second parties shall have the right to examine and inspect all and every part of said plant, and the additions, improvements, and increase, at all times. After exercising their said option to purchase, said second parties shall be entitled to the possession of said plant, including the additions, improvements and increase.

Paragraph 5. Said abstract plant is intended to include the good will of said company, and said company, and its officers, agree not to start or be interested in any other abstract plant in or of the records of Pierce County, Washington, or of any part of such records, during the life of this lease, nor until the above plant is paid for in case said second parties exercise their option to purchase.

Paragraph 6. Time is the essence of this agreement.

Paragraph 7. Nothing herein contained shall be construed so as to extend the time of payment of the sum or of any of the sums to be paid under this agreement beyond the time expressly reserved by said company at its option to declare this contract null and void upon failure of said second parties to pay at the time herein fixed for such payment any sum or amount herein provided to be paid by said second parties, or upon the failure of said second parties to fully comply with any of the terms and conditions hereof.

Paragraph 8. Said company represents that it is the owner of said plant and that the same is unencumbered, and shall remain unencumbered during the life of this lease, but said company makes no representations as to the character, quality, accuracy or completeness thereof.

This entire agreement shall extend to and be binding upon said company, its successors and assigns, and to said second parties, their legal representatives and assigns.

IN WITNESS WHEREOF, we have subscribed this agreement the day and year first above written.

Wilson Title and Abstract Company,

(Seal)

By R. C. Wilson, President.

Franklin Fogg.

A. D. Willoughby.

Assignment.

In consideration of the sum of one dollar and other good and valuable considerations, I hereby sell, assign, and transfer to Franklin Fogg all my interest in that certain lease and option to buy the abstract plant and property of Wilson Title & Abstract Company, dated December 6th, 1909, this day entered into between said Wilson Title & Abstract Company as party of the first part, and said Franklin Fogg and A. D. Willoughby as parties of the second part, this assignment to be subject to all of the terms and conditions of said lease and option.

Dated at Tacoma, December 6th, 1909.

A. D. Willoughby.

In consideration of the foregoing assignment, I hereby agree to indemnify and hold harmless the said A. D. Willoughby from any loss or liability under or by virtue of said lease and option.

.....

Exhibit "B."

Bill of Sale.

KNOW ALL MEN BY THESE PRESENTS, that Commonwealth Title Trust Company, a corporation organized and existing under the laws of the State of Washington, party of the first part, in consideration of the sum of one (\$1.00) dollar and other good and valuable considerations, to it in hand paid by the Title Insurance & Investment Co., of Tacoma, a corporation duly organized and existing under the laws of the State of Washington, party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, its successors and assigns the following goods, chattels and property, to-wit: A set of current files embracing a number of volumes properly numbered and identified with the proper fee numbers thereon, and containing an abstracted copy of all deeds, mortgages, or other conveyances, mechanics' liens, leases, and all miscellaneous records affecting the title to real property in Pierce County, or filed for record in the office of the county auditor of Pierce County up to June 1st, 1909, said records containing information full and complete enough to enable any abstract company to compile an abstract as full and complete as the abstracts made and put out heretofore by the Title Insurance & Investment Company of Washington.

TO HAVE AND TO HOLD the same to the party of the second part, its successors and assigns forever. And it does for itself and its successors and assigns agree to and with the said party of the second

part, its successors and assigns, to warrant and defend the sale of said property, goods and chattels hereby made unto said party of the second part, its successors and assigns against all other persons whomsoever lawfully claiming or to claim the same.

IN WITNESS WHEREOF, the said party of the first part has hereunto set its hand and corporate seal this 7th day of December, A. D. 1909.

Commonwealth Title Trust Company,
By H. H. Gove, President.

Attest: Horace Fogg, Secretary.

The Commonwealth Title Trust Company
Corporate Seal
1902
Tacoma, Washington.

Exhibit "C."

Memorandum of Agreement.

MEMORANDUM OF AGREEMENT, made and entered into this 7th day of December, A. D. 1909, between Title Insurance & Investment Company of Washington, the party of the first part, the Title Insurance & Investment Co., of Tacoma, as party of the second part, and Commonwealth Title Trust Company, as party of the third part.

WITNESSETH: That whereas said Commonwealth Title Trust Company is the owner and possessor of an abstract plant at Tacoma, Washington, and said Title Insurance & Investment Co., of Tacoma, is the owner and possessor of a similar abstract plant at Ta-

coma, and whereas said Title Insurance & Investment Company of Washington is the owner and holder of a mortgage for \$80,000, on the plant and property of said The Title Insurance & Investment Co. of Tacoma, and whereas said abstract plants, or some part thereof, may become lost, damaged, or destroyed by fire, theft, negligence or other cause,

NOW THEREFORE, for the mutual protection of said plants, and in consideration of the mutual agreements of the parties hereto, it is hereby mutually agreed that in the event that any of the abstract records of any of the parties hereto shall be lost, damaged or destroyed by fire or any other cause, or any part of said records, then the other company shall and will permit the use of its records, without expense, for the purpose of re-writing or restoring the records so lost, damaged, or destroyed. **PROVIDED**, that the same shall be used in the office of the company owning the same and under supervision and such reasonable regulations as may be imposed by such company so owning the same, so that its own use thereof in its business shall not be interfered with, or the safety of its said records jeopardized.

It is further agreed that in the event that any of the abstract records of said the Title Insurance & Investment Co., of Tacoma, shall be lost, damaged or destroyed, and said company shall fail or neglect to rewrite or restore its said records and make use of the privilege and rights above granted, then said Title Insurance & Investment Company of Washington shall have the right, as mortgagee, to rewrite or restore the same, at the expense of said mortgagor, and shall have

the rights and privileges hereinabove granted of making use of the records of said Commonwealth Title Trust Company for that purpose.

This agreement shall remain in full force and effect during the life of said mortgage, dated December 7th, 1909, given by said The Title Insurance & Investment Co. of Tacoma to said Title Insurance & Investment company of Washington, on its said abstract plant at Tacoma.

IN WITNESS WHEREOF, said parties have caused their corporate names to be subscribed hereto, in triplicate, the day and year first above written.

Title Insurance & Investment Company of Washington,

(Seal)

By C. B. Othick, Vice President.

Attest: A. D. Willoughby, Secretary.

The Title Insurance & Investment Co. of Tacoma,

(Seal)

By A. D. Willoughby, President.

Attest: A. F. Albertson, Secretary.

Commonwealth Title Trust Company,

(Seal)

By Edward Fogg, Vice President.

Attest: Franklin Fogg, Secretary.

(Here follows a long inventory which is not material to any question on appeal except the following:)

A set of current files embracing a number of volumes properly numbered and identified with the proper fee numbers thereon, and containing an abstracted copy of all deeds, mortgages, or other conveyances, mechanics' liens, leases, and all miscellaneous records affecting the

title to real property in Pierce County, or filed for record in the office of the county auditor of Pierce County, up to June 1st, 1909, said records containing information full and complete enough to enable any abstract company to compile an abstract as full and complete as the abstracts made and put out heretofore by the Title Insurance and Investment Company of Washington.

TESTIMONY AT TRIAL.

On June 16th, 1916, the cause came on regularly to be heard before E. E. Cushman, District Judge, the plaintiff being represented by Frank H. Kelley, John H. Hall and Robert M. Davis, Esqs., the defendant being represented by Bates, Peer & Peterson, Esqs.

The defendant objected to the introduction of any testimony on the ground that the complaint failed to state facts sufficient to constitute a cause in equity against the defendants, or any of them, or to entitle the plaintiff to any relief against the defendants, or any of them. The objection was overruled for the time being, the Court stating that the matter could be considered in final argument.

Whereupon the plaintiff by competent testimony, over the objections of the defendants, proved that the cost of procuring the "take-off" of current records, down to the time of the trial of this action, in compliance with the terms of the agreement marked "Exhibit B," attached to the complaint, was twenty thousand dollars, and that defendants offered no testimony on this subject.

The parties to this suit therefore hereby stipulate and agree that in the event by the final determination of this action it shall be decreed that appellant is entitled to said "take-off," the Commonwealth Company shall have the option of turning over said "take-off" down to the time of the trial of this action, within sixty days after the entry of said final decree, or paying to the appellant the sum of twenty thousand dollars, in lieu thereof.

A. D. Willoughby, a witness called by the plaintiff, being sworn, testified in direct examination, that he was the individual referred to in the pleadings and contracts in the suit; that in 1911 he was president of the Traders Trust Company, an Oregon corporation organized to operate properties belonging to witness and Mr. and Mrs. O. M. Smith, which company then owned certain notes and a mortgage to secure the same made by the Title Insurance & Investment Company of Tacoma to the Title Insurance & Investment Company of Washington; that in 1911 resulting from dealings had by the witness with the several defendants Fogg and Gove, the contracts set forth in the complaint and attached thereto as Exhibits "A," "B" and "C," were entered into; that pursuant to these agreements the notes of the Title Insurance & Investment Company of Tacoma, then held by the Traders Trust Company, were surrendered and the mortgage to secure these notes were satisfied of record; that for the surrender of these notes and the satisfaction of the mortgage the Traders Trust Company received the contracts referred to as Exhibits "A," "B" and "C" and notes of the Title

Insurance & Investment Company of Tacoma (these notes, marked Plaintiff's Exhibit 1, shown to the witness and by him identified, were then admitted in evidence; the original agreement of the Commonwealth Title Trust Company was then shown to the witness and by him identified, and was offered in evidence and admitted as Plaintiff's Exhibit 2).

O. M. Smith, a witness called by the plaintiff, being sworn, testified on direct examination; that he was the individual mentioned in the contracts and pleadings; that he had been continually in the abstract business from 1886 until 1912, and in Pierce County from 1905 to 1910, and was familiar with the work necessary to abstract records. The business of abstracting consists of showing such instruments of record affecting the title to real property with sufficient particularity to enable one to determine the character of a given title without referring to anything outside of the abstracts. The abstract is prepared from public records only from which the abstractor has obtained the information for the customer; such abstracts are prepared upon special order to cover a given tract of land but abstractors customarily keep in stock certain sheets which are combined with other sheets to make the abstract; the abstract given to the customer is simply a copy of the information relating to a given title. The first thing that a company has to do in order to render that service in the conduct of its business, is to have a tract index showing all of the instruments affecting any particular piece of property in a county. Second: To have a name index. It should show everything that may in any

way affect real property that does not contain a description of land, such as judgments, personal judgment, attachments, etc. Everything you would want to complete a chain of title. It has been our custom to prepare abstracts of record of that kind in this county. The sources from which we obtain our information are from the public records, city hall, court house and United States Court. A customer comes to our office for an abstract, or for a continuation; we make it up for him, and make him a price, and he pays us for it. Abstracts are prepared under special order, but at the same time we usually keep what is called stock, like taking a certain section where there are several additions, we will make up stock covering all of these additions in that section. The information which is contained in a given abstract still remains as part of our records in the office. We have a copy in some form of everything we send out.

Franklin Fogg, one of the individual defendants, a witness called by the plaintiff, being sworn, testified that he was a stockholder and officer of the defendant Commonwealth Title Trust Company and manager of its business; in 1911 witness was a stockholder of the Title Insurance & Investment Company of Tacoma, but did not know who were its officers; in 1911 the officers of the Commonwealth Title Trust Company were Horace Fogg, president; Fred S. Fogg, Edward Fogg and H. H. Gove, vice president; Franklin Fogg, secretary and treasurer; all of these officers constituted the trustees.

On cross examination the witness testified that he might have been mistaken as to H. H. Gove being an officer in December, 1911; that Gove resigned in 1909, but the witness' recollection was that he was re-elected vice president after 1911.

On redirect examination the witness testified that H. H. Gove was not an officer of the Commonwealth Title Trust Company on or prior to December 2nd, 1911, but was a stockholder of the company; the four Fogg boys were the trustees of the company at that time.

H. H. Gove, one of the individual defendants, called as a witness by the plaintiff, being sworn testified that prior to December 7th, 1909, he was a stockholder, trustee and president of Commonwealth Title Trust Company on which date he resigned as president and trustee but continued a stockholder having the same stock interest; that about the middle of December, 1911, he was re-elected a trustee and became a vice president of the company; that he became a stockholder, trustee and vice president of the Title Insurance & Investment Company of Tacoma in December, 1909, the other officers being A. D. Willoughby, president, with the witness, Willoughby, Mr. Albertson and Mr. Rice as trustees; that in December, 1909, the stock held by Willoughby, Albertson and Rice was surrendered and re-issued to Horace Fogg, Franklin Fogg, Edward Fogg, Herbert H. Gove, Fred S. Fogg and D. I. Fogg, and that from and after December 30th, 1909, neither Willoughby, Albertson or Rice had any interest in or connection with the company; the company was organized about De-

ember 1st, 1909; Fred Fogg and Franklin Fogg had the matter in charge; its purpose was to take the title and to execute the mortgage to secure the purchase of certain property from the Title Insurance & Investment Company of Washington; its articles called for five trustees, but from and after January 1st, 1910, witness and Fred S. Fogg were its sole trustees and conducted its business without any other trustees or officers; the management was substantially in witness's hands and was carried on in the interest of the stockholders of the Commonwealth Title Trust Company and the stockholders of the Title Insurance & Investment Company of Tacoma, who were substantially identical.

Horace Fogg, one of the individual defendants, a witness called by the plaintiff, being sworn testified that prior to December 7th, 1909, he was a stockholder and officer of defendant Commonwealth Title Trust Company, and was one of the parties interested in the organization of the Title Insurance & Investment Company of Tacoma, which company was organized in the interests of the stockholders of the Commonwealth Title Trust Company for the purpose of taking title to the property purchased from the Title Insurance & Investment Company of Washington and giving a mortgage back to secure part of the purchase price, and also to operate the property after its purchase. The property was operated by defendant Gove in the interests of its stockholders who were substantially identical with the stockholders of the Commonwealth Title Trust Company.

On cross examination the witness testified that the purpose of the organization of the Title Insurance & Investment Company of Tacoma was to suppress the competition of the Title Insurance & Investment Company of Washington.

On redirect examination the witness testified that the two companies had practically all of the abstract business at that time and having the Title Insurance & Investment Company's plant in friendly hands practically suppressed all competition. The attention of the witness being called to the clause of the 1909 mortgage (Defendants' Exhibit A, attached to the answer of defendant Commonwealth Title Trust Company) providing that the mortgagor should operate the plant and use its best endeavor to enlarge and build up the business during the life of the mortgage, the witness testified that the clause was carried out in good faith, and that by suppressing competition he meant doing away with cutting rates which had been theretofore practiced; that no attempt was made or any intention existed to raise prices. The only purpose being to do away with price cutting. Just prior to the formation of this new company, and Mr. Gove taking charge of it, the rates were being cut from 25 to 50 per cent. After Mr. Gove took charge the rates were held up to the old-time rates of one dollar. There was no attempt made or purpose to increase this price. It would have been possible for us, or any person engaged in the abstract business, to raise prices so that they would be exorbitant; if both companies controlled practically all of the business the public would have to pay the price

demand, up until the time some other concern would come in; that the abstract business was open to all, but required a plant which required time to produce; that an abstract made from the public records would not be accepted in the ordinary course of business.

The witness' attention was called to Section 8795, Remington's & Ballinger's Code of Washington, as follows:

“DUTIES OF AUDITOR AS CUSTODIAN. The county auditor, in his capacity of recorder of deeds, is sole custodian of all books in which are recorded deeds, mortgages, judgments, liens, encumbrances, and other instruments of writing, indexes thereto, maps, charts, town plats, survey, and other books and papers constituting the records and files in said office of recorder of deeds; and all such records and files are and shall be matters of public information, free of charge to any and all persons demanding to inspect or to examine the same, or to search the same for titles of property. It is said recorder's duty to arrange in suitable places the indexes of said books of record, and when practicable, the record books themselves, to the end that the same may be accessible to the public, and convenient for said public inspection, examination and search, and not interfere with the said auditor's personal control and responsibility for the same, or prevent him from promptly furnishing the said records and files of his said office to persons demanding any information from the same. The said auditor or recorder must and shall, upon demand and without charge, freely permit any and all persons, during reasonable office hours, to inspect, examine and search any or all of the records and files of his said office, and to gather any information therefrom, and to make any desired notes or mem-

oranda about or concerning the same, and to prepare an abstract or abstracts of title to any and all property therein contained."

The witness testified that he was familiar with that law. Any one could examine the records, but would not know whether he had all of the instruments that the county auditor had or not. There are no indexes by which he could know whether the recorded instruments affected a given title.

The witness' attention was called to Section 8792, Remington & Ballinger's Code, reading as follows:

"TO SEARCH RECORDS AND FURNISH CERTIFICATE, WHEN.—The auditor must, upon the application of any person, and upon the payment or tender of the fees therefor, make searches for conveyance, mortgages, and all other instruments, papers, or notices recorded or filed in his office, and furnish a certificate thereof, stating the names of the parties to such instruments, papers, and notices, the dates thereof, the year, month, day, hour and minute they were recorded or filed, the extent to which they purport to affect the property to which they relate, and the book and pages where they are recorded"—and providing further that for neglect or refusal so to do, or for defects therein in any important particular, the auditor is liable to the party aggrieved for damages sustained thereby.

The witness testified that he was not familiar with that provision of the law; that the auditor did not follow that law out, because several times a month the county auditor gets letters from people living in other places sending here to him to make abstracts, and he turns them over to one of the abstract companies, without even notifying the party making the applica-

tion; he sends it down to us, and tells us to make an abstract and forward it to the people ordering it, and we do it for him. The county auditor made abstracts here in the early days, but not since 1890.

On re-cross examination the witness testified that he had been in the abstract business for 15 years; that the usual custom was that an abstract would be ordered from an abstract company organized for that purpose which had been an established business; that it is not possible for the county auditor to make abstracts; that witness never had heard of an abstract made by the auditor; that the Commonwealth Title Trust Company had made about 45,000 abstracts during time witness had been in business.

Thereupon counsel for plaintiff offered in evidence the stipulation as to facts (on Record p. 75) and the same was admitted and marked Plaintiff's Exhibit 3.

Thereupon plaintiff rested its case in chief.

DEFENSE.

Thereupon the defendants offered the following:

Fred S. Fogg, one of the individual defendants, being called by the defense and sworn, testified that he was a stockholder, trustee and officer of defendant Commonwealth Title Trust Company and identified a copy of the articles of incorporation of that company, which was offered and received in evidence and marked Defendants' Exhibit A; that he has been a stockholder, officer, trustee and attorney for the Commonwealth Company since its organization in 1901 or 1902, and

has taken a very considerable interest in its business, and is familiar with the transacting of all of its business of any consequence. The witness further testified that he was familiar with the execution of the agreement attached to the complaint as Exhibit B; that the company did not receive any money, property or labor performed in consideration of that agreement. The witness further testified that he was familiar with the mortgage executed by that company (see Exhibit C attached to the complaint), and that the company did not receive any money, property or labor performed in consideration of that mortgage; that the consideration received by that company for these two instruments (Exhibits B and C attached to the complaint) was the extinction of the competition of the Title Insurance & Investment Company of Tacoma as an active abstract-making concern. The witness further testified that at the time these agreements were executed in 1911 the Commonwealth Title Trust Company, the Title Insurance & Investment Company of Tacoma and the Tacoma Title Company were engaged in the abstract business in Tacoma, the latter company for about a year. The Commonwealth Title Trust Company and the Title Insurance & Investment Company of Tacoma were doing practically all of the business, and that when the plant of the Title Insurance & Investment Company was boxed up and shipped to Portland, the Commonwealth Title Trust Company did substantially all the business. The witness further testified that an abstract plant consisted of abstracted copies of all instruments filed at the county court house affecting the title to real estate

in the county, together with indexes to make these records available in the making of abstracts; that the abstract business consisted of making and selling abstracts of title to real property. An abstract of title is made by taking a list of the instruments affecting the title to the particular piece of property from indexes of the abstract company. Then such instruments as are kept in stock are taken and those not kept in stock are copied and put together with a certificate that these instruments constitute all recorded instruments affecting such title between the dates specified, which is then fastened together, bound, delivered to the customer, the price being fixed by the number of instruments shown in the abstract at a certain price per instrument. The abstract plant contains copies of the essential portions of all of the instruments affecting the title to real estate in Pierce County, made by stenographers kept by the abstract company at the court house constantly, who copy the essential portions of all instruments filed every day, and send them down to the office where it is kept in permanent form. If an order comes for an abstract on a particular piece of property, we do not go to the court house for the information, but it is gotten from the company's permanent files kept on hand. Numbers of abstracts are made up and kept on hand. Some portions of abstracts are made up and kept in stock, relating to the original plat and additions thereto of Tacoma, and all the company has to do is to take these instruments from stock on hand, and the same way with other additions. In the preparation of abstracts the Commonwealth Title Trust Company employs from

six to fifteen persons, according to the demand from time to time. The witness further testified that he had experience in the purchase and sale of real estate in Pierce County, both for himself and as attorney for others, for fifteen or eighteen years to a very considerable extent; that it would not be possible to sell or make loans upon real estate of any particular value without an abstract from one of the companies engaged in the business; that applies to all the time that I have been here in business, for about fifteen years. The witness then identified a writing containing an agreement of A. D. Willoughby and O. M. Smith relating to their engaging in the abstract business in Pierce County, which agreement was offered and received in evidence and marked Defendants' Exhibit B, and testified that the same was delivered about the time that the other papers in the transaction were executed and delivered, and as a part of the same transaction.

Attorneys for plaintiff stated in open court that for the purpose of the record they would admit the signatures to Defendants' Exhibit "B," to be the signatures of Smith and Willoughby mentioned in the pleadings.

On cross examination the witness testified that his recollection was that the several instruments were signed in the evening and that the letter of Smith and Willoughby was to be brought in the next morning, and it was so brought in in the morning. The negotiations had taken some days and culminated in the formal executions of the written instruments on December 2nd, 1911; that the Willoughby-Smith agreement had been discussed and reached before the papers were executed.

Willoughby and Smith had the papers prepared and omitted the agreement contained in the letter. It was not the witness' recollection that the letter was the result of a conversation with Mr. Willoughby which took place after the other negotiations had culminated in the formal execution of the papers. The witness further testified that he understood that the county auditor is under a substantial bond, that the reason a purchaser or mortgagee of real estate would not accept an auditor's abstract of title was that an auditor did not have the means to prepare an abstract upon which people could rely; in practice it is impossible for him to make a reliable abstract even though under bond, for purchasers and lenders are not looking for a suit on the bond but for a reliable abstract. It is a physical impossibility for the auditor to make reliable abstract. The witness further testified that all the sources from which an abstract is made are open to the public or to any one who desires to go into the abstract business. An abstract company cannot begin to transact business from the day it opens its office, and produce accurate abstracts, although in some instances the public will accept them. The witness further testified that he knew Mr. Swanson and Mr. McFarland of the Tacoma Title Company as experienced abstract men, but did not know the amount of business done by the company in December, 1911, except by his general familiarity with the abstract business in Pierce County, but would estimate that amount at ten per cent, sixty per cent being done by the Commonwealth Title Trust Company and thirty per cent by the Title Insurance & Invest-

ment Company. The Wilson option of purchase expired December 6, 1911, but the lease extended to December, 1913, when the Wilson plant was leased to the Tacoma Title Company and has been operated by that company since that time. When the plant of the Title Insurance & Investment Company of Tacoma was boxed up and put in cold storage, the Commonwealth Title Trust Company was able to get a greater part of its business. The Tacoma Title Company was competing to a small extent and its business was growing slightly and when it took over the Wilson plant its business increased so that now it may be doing twenty-five or thirty per cent of the business; would be surprised to learn that it had done forty per cent of the business since 1914. The witness further testified that the reason it was practically impossible to sell or mortgage real estate without an abstract company's abstract was that the company abstract would carry as great a responsibility as a county auditor's abstract, although such companies are not under bond and are responsible only to the extent of their assets; abstracts of title have no general market value, but have a limited market value to persons interested in the property covered by the abstract. You could offer for sale to the general public either at auction, execution sale, or otherwise, and have a value put upon the abstract. For instance, there would be a very general sale of abstracts of title to all property within the limits of a townsite of Tacoma covering several sections of land, because down to the plat, and including a great many instruments filed after the plat, the instruments are the same in all abstracts, which would be com-

piled affecting that property. These abstracts would be of general value to many owners of thousands of lots. The general price for abstracts for many years had been \$1.00 per instrument, which has been cut at times but never exceeded. Witness stated that the consideration of the Commonwealth Company for its guaranty was the putting out of business of the abstract plant of the Title Insurance & Investment Company of Tacoma, and keeping it out of business, and that it received no other consideration; but that the Title Insurance & Investment Company of Tacoma received as consideration the satisfaction of its former notes and mortgage, an extension of time for the unpaid balance and the elimination of loss by operating the plant and the threat of foreclosure; that the benefits of these considerations flowed to the stockholders of that company who were substantially identical with the stockholders of the Commonwealth Title Trust Company. The witness further testified that at the time the guaranty of the Commonwealth Title Trust Company was made, there was a doubt on the part of Mr. Hayden, representing Mr. Willoughby and Mr. Smith, and the witness as to the valid binding force and effect of that company's guaranty. The individual guarantors gave the guaranty that was given there, because it was insisted upon, and that was the reason it was given. There was no intent or purpose to perform an illegal act. We did not consider at that time that we were performing an illegal act, but since looking up the authorities I have had to change my mind about it. At the time Mr. Hayden and myself considered the matter care-

fully, and determined that the action was not illegal, but we considered it a close question. In plaintiff's Exhibit "B," attached to the complaint, the words, "in consideration and acceptance of the foregoing guaranty and agreement by the Traders Trust Company, and other valuable consideration," refer alone to the acceptance of the contract of the Traders Trust Company. There was nothing to cover the clause "other valuable consideration." The words "in the resolution of the stockholders," contained in the agreed statement of facts, and in Defendants' Exhibit 3, attached to the answer, "in consideration of the advantages and benefits accruing to and arising out of the transaction," refer to the putting out of business, and out of competition of the abstract plant and business of the Title Insurance & Investment Company of Tacoma, and the preventing of anybody else coming in and using and foreclosing the mortgage, and the preventing of anybody else coming in and starting up with a plant. Those are the only advantages and benefits which flowed to the Commonwealth Company in the execution of the guaranty agreement. The stockholders of the Commonwealth Company were not relieved of any onerous provision. There was no liability resting upon the stockholders of the company.

On re-direct examination the witness testified: Both Mr. Hayden and myself considered it a close question as to whether the contract of guaranty was legal or not. Mr. Hayden had considerably more doubt about the legality of it than I had, and that same doubt obtained as to the guaranty of the individuals; the same

question as to whether or not it was of any binding force and effect, and Mr. Hayden had more serious doubts as to its legality than I had, and so expressed himself. The witness further testified that the considerations recited in the Commonwealth Title Trust Company's guaranty benefited that company only by getting the plant of the Title Insurance & Investment Company out of the way and avoid a possibility of its falling into hostile hands by foreclosures. As a matter of fact they were insisting upon these new notes being made, and a new mortgage being given by the Title Insurance & Investment Company, and it was the only way this plant could be put out of business, and a foreclosure prevented. We intended to carry out the agreement, but could not do so, because the abstract business did not earn enough to do so, and as the whole series of arrangements from 1909 on was for the benefit of all concerned, including Smith and Willoughby, we felt that the depreciation in business should be considered by them as well as by us in reaching an adjustment based on actual conditions. We endeavored to reach such an adjustment to avoid a law suit; they had already received \$20,000 on the principal debt and about \$22,000 interest. We offered to turn over the lot which was covered by the Commonwealth mortgage, provided the obligations of the Commonwealth Company under this guaranty should be released, so as to stop the whole thing, and they could take their plant and go back into business, but that was not satisfactory. We were unable to make any adjustment. We have other negotiations involving other particular offers, but nothing was ac-

complished, and then this suit was brought. The witness further testified that the cost of an abstract by a county auditor would be much greater than the cost of one prepared by an abstract company. The witness further testified that all of the papers in the matters considered in Dec. 1911 were prepared by E. M. Hayden as attorney for Smith and Willoughby, including the record of corporate actions, and it was a material part of the agreements that Smith and Willoughby should keep out of the abstract business in Pierce County during the life of the agreements. The other papers were executed in the evening and it was then discovered that this particular agreement was not included and Willoughby and Smith were told to prepare it and bring it in the next morning which they did. The witness further testified that he had never seen or heard of an abstract prepared by the county auditor and that such an abstract would have no marketability.

On re-cross examination the witness testified that some abstracts are on the market, particularly those relating to property within the plat of New Tacoma which could be obtained from the Tacoma Land Company. The reason an auditor's abstract would have no marketability was that the impossibility of the preparation of an accurate abstract by an auditor is apparent. The witness further testified that while changes were made in the original draft of the contracts and other writings between the parties no change was made to include the agreement of Smith and Willoughby to keep out of the abstract business in Pierce County nor was this matter referred to in the corporate resolution authorizing the

contracts. The witness further testified that while the holders of the 1909 mortgage referred to let matters stand as they were under that mortgage, it was not possible to meet the obligation therein undertaken and to avoid foreclosure which might bring the property into hostile hands the contracts of 1911 were made; that to meet the doubt as to the taint of monopoly and restraint of trade in the Commonwealth Title Trust Company's guaranty the guaranty of the individual defendants was demanded and made; the doubt was not as to the corporate power to make such guaranty but was as to its monopolistic tendency. Counsel for plaintiff then stipulated that Horace Fogg, Franklin Fogg and H. H. Gove, individual defendants herein, if called as witnesses would testify upon direct and cross-examination as to the nature of the abstract business and its methods of business to the same effect as the witness Fred S. Fogg, which stipulation was accepted by the counsel for defendants and by the court.

Horace Fogg, one of the individual defendants, being called by the defense and sworn, testified that he was the president of the Commonwealth Title Trust Company in December 1911, and had been for sometime, and took an active part in the negotiations which led up to the execution of the various instruments on December 2nd, 1911, as such president. There was no money paid to the Commonwealth Title Trust Company; neither was any property received by the Commonwealth Title Trust Company, nor was any labor done for the Commonwealth Title Trust Company, for the execution of the contract of guaranty, and the mortgage by the

Commonwealth Title Trust Company, attached to the complaint, marked "Exhibits B and C," and the only consideration moving to the Commonwealth Title Trust Company for the execution of those instruments was the elimination of competition by the boxing up of the T. I. & I. Company's abstract plant at Tacoma, and shipping it out of the County, and thereby preventing the foreclosure of the mortgage thereon, and the re-entry of that plant into active competition with the Commonwealth Company, either through Smith or Willoughby, or through the sale to some other party. The witness further testified that the matter of Smith and Willoughby keeping out of the abstract business in Pierce County had been discussed and agreed to before any of the papers were executed and was a material part of the consideration; that Mr. Hayden as their attorney had drawn and submitted the papers and it was then discovered that the Smith-Willoughby agreement had been omitted, which omission Smith and Willoughby agreed to supply, which they afterward did by the paper in evidence as Dft. Exhibit "B." The witness further testified that in 1911 these companies were in the abstract business in Tacoma: the Commonwealth Title Trust Company which did about sixty per cent of the business, the Title Insurance & Investment Company of Tacoma which did about thirty per cent and the Tacoma Title Company which did about ten per cent; that after the Title Insurance & Investment Company went out of business in Dec. 1911 the Commonwealth Title Trust Company did ninety per cent of the business, although thereafter the business of the Tacoma Title Company

began to grow. On Dec. 2nd, 1911, the Commonwealth Title Trust Company employed twelve persons and the Title Insurance & Investment Company employed ten persons.

On cross examination the witness testified that his testimony as to the business done by the several companies was an estimate only, without accurate information. The witness further testified that in stating that the consideration for the Commonwealth Title Trust Company's guaranty consisted only of the elimination of competition of the Title Insurance & Investment Company's plant and avoidance of its foreclosure under the mortgage, he did so because under the management of that plant by Mr. Gove price cutting had been eliminated but if the plant returned to Smith and Willoughby, or some hostile party, price cutting was sure to be resumed. The witness further testified that the omission of the personal agreement of Smith and Willoughby was discovered when Mr. Hayden brought the papers for execution and was mentioned in Mr. Hayden's presence, when either Hayden, Smith or Willoughby said it was an inadvertance and the omission would be supplied; afterward they prepared the paper and delivered it; it was not prepared in our office, nor were the corporate resolutions.

On re-direct examination the witness testified that after the agreemnts of Dec. 1911 were made the abstract business decreased so that the payments required by the guaranty of the Commonwealth Title Trust Company could not be made. Negotiations were begun for some new arrangement by letters in evidence and also by

a letter from witness to Willoughby admitted in evidence and marked Dft. Ex. "C," the property therein referred to being that covered by the mortgage in suit. Other offers were made to release all claim to the mortgaged plant, or to give certain tide land property for the plant. Thereafter in Feb. or March, 1915, we were advised by counsel that the contracts were illegal and without sufficient consideration; no offer to compromise was made after this advice was received. They demanded the entire amount due under the contracts and then brought suit.

On re-cross examination the witness testified that no demand was made in excess of the obligation of the contracts; that other offers were made to witness which he did not consider as a compromise because in view of counsel's advice as to the want of validity of the contracts, the offers seemed more binding than the original agreements; after that advice was received we made no attempt to compromise except on the basis of the cancellation of the Commonwealth Title Trust Company's agreement.

After counsel's advice to us that it was illegal, he very strongly advised us to refuse to act under it, and do anything to settle, so any attempts made to compromise were on the possibility of cancelling the Commonwealth agreement, and refusing to act under it, and not to compromise on the promise of carrying out the agreement. It was a question of its being a serious thing to continue to operate. It is not a fact that the offers made by us were much less in amount and value immediately after getting Mr. Bates' advice that it was purely an

illegal contract. We certainly were willing to make the same offers we did before.

Franklin Fogg, one of the individual defendants, being called by the defense and sworn, testified that as manager of the Commonwealth Title Trust Company he took part in the negotiation of the contracts of Dec. 1911; that no money, property or labor performed was received by that company in consideration of its guaranty and mortgage of that date; the consideration for it was the boxing up and the removal of the so-called Smith & Willoughby abstract plant from the county from active competition, and the preventing of the foreclosure of the mortgage on that plant, and its falling into the hands of anyone who would put it in active operation as a hostile competitor and to prevent it getting back in that shape, or any shape. The witness further testified that the agreements of Smith and Willoughby to keep out of the abstract business in Pierce County, contained in Dft. Ex. "B," were discussed and agreed to prior to Dec. 2nd, 1911, and were a principal part of the negotiations and agreements. When the papers which Mr. Hayden had prepared were examined by Fred Fogg he discovered that this particular agreement had been omitted. I think Mr. Smith had gone at this time and Willoughby's attention was called to the omission. He went after Smith and returned either that evening or the next morning with the written letter. The witness further testified that prior to Dec. 2nd, 1911, three companies were in the abstract business, the Commonwealth Title Trust Company doing sixty per cent of the business, the Title Insurance & Investment Company

doing thirty per cent and the Tacoma Title Company ten per cent. After the Title Insurance & Investment Company plant was shipped to Portland the Commonwealth Title Trust Company did about ninety per cent of the business. On cross examination the witness testified that the proportion of business by the Tacoma Title Company had increased and the business of the Commonwealth Title Trust Company had decreased so that probably the Tacoma Title Company was now doing forty per cent of the business. The witness further testified that the agreements of Dec. 1911 were made to avoid the foreclosure of the 1909 mortgage, that it was a new deal in which the Title Insurance & Investment Company of Tacoma, whose stockholders were practically identical with the stockholders of the Commonwealth Title Trust Company, got the benefit of the extension of the time of payment from nine years to thirty-two years, the reduction of the interest rate from seven per cent to five per cent.

On re-direct examination the witness testified that the payments on the mortgage of 1909 were made by the Title Insurance & Investment Company of Tacoma out of its earnings.

By agreement of counsel the exhibits attached to the complaint and to the answer of defendants were admitted in evidence.

J. L. Wadsworth, a witness called by the defense, being sworn, testified that he had been auditor of Pierce County in 1913-14 but had made no abstracts of title; had received inquiries for abstracts but had referred such inquiries to the abstract companies. It is not practical

for the auditor to make abstracts because he has no tract indexes, which are chains of title by which one sale can be followed to another. Grantor and grantee indexes are the only ones kept by the auditor, a search of which would not show all instruments affecting title; under present conditions the only way an auditor could procure an abstract would be to get it from an abstract company. The auditor would have to examine all the records of his and other offices. He has authority to examine other county offices but no authority to examine city or United States Court offices, and would certify only to what appeared of record in his own offices. It is the general practice to obtain abstracts from the abstract companies and has been for some years past.

On cross examination the witness testified that he was familiar with the laws relating to the duty of the auditor to make abstracts of title but was under the impression that a later law had relieved him of that duty. The auditor could not prepare an abstract without a tract index. Copies of the daily abstracts made by the abstract companies from the auditor's records were delivered to the county assessor and were available to the auditor. When inquiries for abstracts were received the inquirer was referred to the abstract companies without being informed that it was the auditor's duty to prepare an abstract if requested so to do.

On re-direct examination the witness testified that an auditor to make an abstract would have to examine the records from the beginning which would require much time and be very expensive.

James H. Davis, a witness called by the defense, be-

ing sworn, testified that he had been county auditor from 1901 to 1905; had received applications for abstracts of title but did not make them but referred the application to the abstract-companies; did so because it is impractical for the auditor to make abstracts because he has not all of the records which go to make up an abstract. He has no tract index, only a grantor and grantee index. To prepare an abstract the auditor would have to examine the record back to the government title which would be very expensive; an abstract company could make it in much less time. The custom is to get abstracts from the abstract companies. Sales and mortgages of real estate require such an abstract.

On cross examination the witness testified that the auditor is entitled by law to charge seventy-five cents an hour for searching the records and would be entitled to that fee for preparing an abstract, which would run back to the government title whether prepared by the auditor or an abstract company.

C. A. Campbell, a witness called by the defense, being sworn, testified that he was now a deputy auditor of Pierce County and had been a deputy auditor in 1909-10-11; that applications for abstracts had been made to the auditor but no abstracts had been made, the applications being turned over to the abstract companies.

It was stipulated by counsel that W. A. Stewart if called as a witness would testify that he was auditor of Pierce County from 1908 to 1912 and would testify in other respects to the same effect as the witness Campbell.

It was further stipulated by counsel that in the event the court should allow an attorney's fee to the plaintiff, the amount should be fixed by the court without evidence thereof.

REBUTTAL.

Elmer M. Hayden, a witness called by the plaintiff in rebuttal, being sworn testified that he was attorney for Smith and Willoughby in the matters relating to the contracts of Dec. 1911 and as such had several conferences with Fred S. Fogg, who represented the parties on the other side; that at no time prior to the execution of these contracts was any question as to their invalidity as monopolistic or in restraint of trade mentioned or discussed, but the corporate power of the Commonwealth Title Trust Company to make its contract of guaranty was discussed and was regarded as a debatable question, to meet which it was determined to take the guaranty of the individuals interested in that company of the validity and binding effect of the agreement. The witness further testified that he never had seen the paper containing the agreement of Smith and Willoughby to keep out of the abstract business in Pierce County nor was there any discussion of the subject matters to his knowledge at any time during the negotiations, nor had he ever heard of the matter until within an hour of the time he went on the witness stand.

On cross examination the witness testified that he did not know or undertake to say whether the Smith-Willoughby agreement had been discussed before witness came into the negotiations.

C. E. McFarland, a witness called in rebuttal by the plaintiff, being sworn, testified that he had been in the abstract business for a number of years, being employed by the Commonwealth Title Trust Company for eight or ten years prior to March, 1914, when he left their employ and became interested in the Tacoma Title Company. While in the employ of the Commonwealth Title Trust Company he had attended to the counter business and made collections and knew the amount of business done by them. Had performed similar services for the Tacoma Title Company and knew the amount of business done by them. On March, 1914, the Commonwealth Title Trust Company was doing substantially sixty per cent of the business and the Tacoma Title Company substantially forty per cent, which proportion remains substantially unchanged.

A. L. Swanson, a witness called in rebuttal by the plaintiff, being sworn, testified that he had been in the abstract business for twenty years, and connected with the Tacoma Title Company since 1911. That company had been then and at all times since then was and is now actively engaged in the abstract business and is equipped to do a general abstract business of all kinds.

A. D. Willoughby, a witness in rebuttal by the plaintiff being sworn, testified that in all the negotiations leading up to the agreements of Dec. 1911 there was no discussion on the part of any one of any intent or purpose to withdraw from competition or prevent the use in competition of the abstract plant upon which the Traders Trust Company then held a mortgage lien. The negotiations were confined to the endeavor on my part

and Mr. Smith's part, representing the Traders Trust Company, to obtain payment of or a satisfactory security for the debt secured by the mortgage. The witness further testified that the agreement of witness and Smith to keep out of the abstract business in Pierce County had been obtained under these circumstances; a few days after the negotiations of Dec. 1911 had been concluded and the final papers signed, I had a conversation with Franklin Fogg in which I told him that Smith had got into trouble in Portland by agreeing to keep out of a business and breaking his agreement. Fogg said to me "We will take your word for it, Willoughby, that you won't go back into business because we would not want to buy you out and then have you start in business in opposition to us the next day, and under the circumstances I would not care to take Smith's word and we would rather have something in writing that you would not go back into business." I told Fogg to have a writing prepared, which was done, and I took it to Smith and he signed it. This was several days after the other matter of Dec. 2nd was closed up.

On cross examination the witness testified that at the time the negotiations of 1911 were under way there was no interest or other payment under the mortgage of 1909 due and unpaid but that an installment of interest was due December 2, 1911.

On redirect examination the witness testified that neither the Traders Trust Company or any one in its behalf had threatened to foreclose its mortgage prior to Dec. 2nd, 1911, for at that time there had been no default under the mortgage.

O. M. Smith, being called in rebuttal by the plaintiff and sworn, testified that at no time during the negotiations which led up to the agreements of Dec. 2nd, 1911, had there been any mention or discussion of any purpose to retire the plant then in the control of the Title Insurance & Investment Company from competition; that this negotiation had been confined to the payment of the 1909 mortgage or security for its payment. There had been no discussion of any agreement by witness and Willoughby not to re-enter the abstract business. Witness first heard of the matter when Willoughby, some days after the contracts of Dec. 2nd, 1911, had been closed, brought the letter to witness which witness signed and returned to Willoughby. Witness further testified that prior to Dec. 2nd, 1911, neither the Traders Trust Company or any one in its behalf made any threat to foreclose the 1909 mortgage then held by that company.

EXHIBITS.

During the trial exhibits were offered and received in evidence as follows:

Plaintiff's Exhibits—

Thirty-two notes, each in the sum of \$2500, payable one each year on December 7th from and including 1915 to 1946. These notes are similar in form and terms to the first note, which is as follows, the written parts being *italicized*:

\$2500.00 Tacoma, Wash., December 2nd, 1911.

On or before Dec. 7th, 1915, after date, without grace, we promise to pay to the order of The Traders

Trust Company of Oregon, Two Thousand Five Hundred and No/100 Dollars in Gold Coin of the United States of America of the present standard of value with interest thereon, in like Gold Coin, at the rate of five per cent per annum from date hereof, until paid, for value received. Interest to be paid semi-annually at Tacoma and, if not so paid, the whole sum of principal and interest to become immediately due and collectible, at the option of the holder of this Note. And in case suit or action is instituted to collect this Note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, a reasonable sum—Dollars in like Gold Coin for attorney's fees in said suit or action.

Due *Dec. 7th 1915*

*The Title Insurance and Investment Co. of Tacoma
At Tacoma Wash. Pac. Nat. Bank.*

By H. H. Gove P.

Endorsements:

Interest paid to June 7, 1913.

Traders Trust Company of Oregon

By A. D. Willoughby Pres.

O. M. Smith Sec'y.

Interest paid to Dec. 7, '13 W.

Interest paid to June 7, '14 W.

Plaintiff's Exhibit No. 2.

Original agreement between Commonwealth Title Trust Company and Traders Trust Company of Oregon, attached to bill of complaint as Exhibit B and printed in full in this record at pages 25-29.

Plaintiff's Exhibit No. 3.

Stipulation of Facts to be taken as evidence printed in full in this record at pages 75-114.

Plaintiff's Exhibit No. 4.

Agreement between Title Insurance and Investment Company of Tacoma and Traders Trust Company of Oregon attached to bill of complaint as Exhibit A and printed in full in this record at pages 21-24.

Plaintiff's Exhibit No. 5 (Same as Exhibit 2.)

Agreement between Commonwealth Title Trust Company and Traders Trust Company of Oregon attached to bill of complaint as Exhibit B and printed in full in this record at pages 25-29.

Plaintiff's Exhibit No. 6.

Mortgage given by Commonwealth Title Trust Company to Traders Trust Company of Oregon attached to bill of complaint as Exhibit C and printed in full in this record at pages 30-34.

Defendants' Exhibit A.

Articles of incorporation of Commonwealth Title Trust Company as follows:

KNOW ALL MEN BY THESE PRESENTS:
That we William E. Bliven, Herbert H. Gove and Horace Fogg, the undersigned, have this day associated our-

selves together for the purpose of forming a corporation under, by virtue of, and pursuant to the laws of the State of Washington, for the objects hereinafter specified, and for those objects do make, subscribe, adopt and execute in triplicate these written Articles of Incorporation and certify as follows:

I.

The name of this corporation is and shall be Commonwealth Title Trust Company.

II.

The objects for which this corporation is formed are: To make and sell abstracts of title of property; to conduct and carry on a general abstract of title, title insurance and certificate of title business in the State of Washington and elsewhere, and to acquire books, papers, records, files and information pertaining to said business; to compile from the public records of Pierce County, Washington, and from the public records of each of the other counties of said State and any other state or territory and from all public records of the United States, cities, towns, counties, school districts, and all other records and sources of information whatsoever, abstracts of title to lands and real estate and information relating thereto, and to prepare, certify to, furnish and sell the said abstracts and information; to examine, certify and issue certificates of title to land and to do any and all acts which are necessary to be done in carrying on and conducting said business.

To act as agent for any person, firm, corporation or body politic.

To publish, buy, sell, and deal generally in legal blanks, books and all other personal property.

To purchase, own, hold, sell, lease or hold, improve, manage, and deal in real estate for itself or as agent or trustee for others.

To do a general mortgage, loan and trust business.

To buy, sell, assign, discount, and negotiate mortgages, promissory notes and any and all other evidences of debt for itself and also as agent or trustee, and to accept and execute all trusts, fiduciary or otherwise, that may be committed to it by any person, firm, or corporation, or by the order or direction of any court.

To act as fiscal or transfer agent of any state, municipality, body politic or corporation, and in such capacity to receive and disburse money.

To transfer, register and countersign certificates of stock, bonds, or other evidences of indebtedness, and to act as agent or trustee of any corporation, foreign or domestic, for any purpose now or hereafter required by statute or otherwise.

To act as trustee under any mortgage or bond issued by any municipality, body politic, corporation, firm, or individual, and to execute any and all trusts not inconsistent with the laws of this state.

To receive and manage the sinking fund of any corporation upon such terms as may be agreed upon between such corporation and those dealing with it, and generally to execute trusts of every description not inconsistent with the laws of this state or of the United States.

To act as administrator, guardian, or receiver under the appointment of any last will or testament, or order of any court.

To act as agent for any fire insurance company or companies.

To buy, own, hold, and sell shares, bonds, and debentures of any government, state, corporation, school district, county, city or any other body or authority.

To loan money and to accept as security therefor and all kinds of personal property and mortgages upon real or personal property or both.

To acquire the goodwill, rights, property, and assets of all kinds of any person, firm or corporation dealing in abstracts of title, or owning an abstract of title plant, and to acquire any and all abstract books, files, records and all property and matters pertaining thereto.

To purchase, take on lease or in exchange, hire or otherwise acquire any real or personal property and any rights or privileges which the company may deem necessary or convenient for the purposes of its business.

To conduct its business and have one or more offices and unlimitedly and without restriction to hold, purchase, lease, mortgage and convey real and personal property in the State of Washington, and in the several states and territories of the United States, the District of Columbia, colonial possessions or territorial acquisitions of the United States and in foreign countries, as shall from time to time be found necessary or convenient for the purposes of the business of this company.

To execute contracts with any person, firm, corporation, city, county, township, school district, or any state or territory or colony thereof or of any foreign government, to receive, accept, hold, and deliver money, papers, and documents in escrow or in trust.

To carry on the business of buying, selling, negotiating, issuing and registering bonds, discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt, receiving deposits of money, buying and selling exchange, coin and bullion; to maintain and let safe deposit vaults, to insure persons having any interest in real estate, either as owner, lessee, mortgagee, judgment creditor or otherwise, against loss by reason of defects of title, or because of liens or encumbrances charging the same.

To purchase, lease, exchange, hire or otherwise acquire any and all rights, privileges, premises, or franchises suitable or convenient for any of the said purposes or objects.

To do any or all of the things in this certificate and in these Articles of Incorporation set forth as objects, purposes, or otherwise, to the same extent and as fully as natural persons might or could do.

It is the intention that the objects specified and clauses contained in this paragraph shall, except where otherwise expressed in said paragraph, be nowise limited or restrained by reference to or inference from the terms of any other clause of this or any other paragraph in this charter, but that the objects specified in each of the clauses of this paragraph shall be regarded as independent.

This corporation shall have all the powers set forth, enumerated, and contemplated by the laws of the State of Washington.

III.

The time of the existence of this corporation shall be fifty years from and after the date of its incorporation.

IV.

The number of trustees who shall manage the business, affairs and concerns of this corporation shall be three, and the names and residence of those who shall serve as trustees until the first Monday of July, 1902, are:

William E. Bliven, residence Tacoma, Wash.

Herbert H. Gove, residence Tacoma, Wash.

Horace Fogg, residence Tacoma, Wash.

In witness whereof we, the undersigned citizens of the United States and of the State of Washington and residents of the City of Tacoma in said state, have and do hereby execute this certificate and these Articles of Incorporation in triplicate this 24th day of February A. D. 1902.

W. E. Bliven (seal)

Herbert H. Gove (seal)

Horace Fogg (seal)

(Acknowledgment in common form)

Defendants' Exhibit B.

Letter and agreement of A. D. Willoughby and O. M. Smith to the Title Insurance and Investment Company of Tacoma, dated December 2nd, 1911, attached to the answer of defendant Commonwealth Title Trust Company as Exhibit 2, and printed in full in this record at page 57.

Defendants' Exhibit C.

Letter from defendant Horace Fogg to A. D. Willoughby at Portland, Ore., as follows:

Tacoma Wash. March 3rd 1915.

Mr. A. D. Willoughby,
Portland, Ore.

Dear sir:—

Referring to your letter of the 1st. you told me in Portland that you and Mr. Smith would come here about the 1st. of March with some kind of proposition whereby the plant could be traded at least the Commonwealth would be released. If you could see your way clear to accept the office lot in exchange for the notes and interest due up to 1921 you would have a property upon which you could have at once raise probably ten thousand dollars if necessary and would be much better security for the bank.

The first of last week I turned the entire matter over to Major Bates to give his opinion upon the legality of the agreement, but he was called to San Francisco and until his return on Saturday or Sunday of this week I am unable to state what our position will be in the matter.

Yours very truly

Horace Fogg.

Defendants' Exhibit D.

Original mortgage given by the Title Insurance and Investment Company of Tacoma to the Title Insurance and Investment Company of Washington, bearing date of December 7th 1909, attached to the answer of the defendant Commonwealth Title Trust Company as Exhibit 1, and printed in full in this record at pages 50-57.

The testimony then closed and further proceedings were postponed until August 7th, 1916, when both sides submitted briefs and the case was argued. On Sept. 28, 1916, the court rendered its opinion in writing as follows:

OPINION OF THE COURT.

This is an action brought by the Lumbermen's Trust Company, an Oregon corporation, against Title Insurance & Investment Company of Tacoma, a Washington corporation (hereinafter called T. I. & I. Company of Tacoma), Commonwealth Title Trust Company, a Washington corporation, (hereinafter called Commonwealth Company), Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, the object of which is to recover judgment against T. I. & I. Company of Tacoma for Eighty Thousand Dollars and interest, and for a decree of foreclosure and sale of the property pledged and mortgaged to secure said indebtedness.

Second: For a judgment against the defendant Commonwealth Company on an instrument of guaranty, and for a decree of foreclosure of a mortgage given to secure said guaranty, and a prayer for alternative relief that if for any reason the agreements and undertakings of the Commonwealth Company be found by the court to be not valid, then the plaintiff have judgment against the defendants Foggs and Gove for such sum as may be found by the court to be due upon the guaranty of the Commonwealth Company, and also for costs and disbursements, including an attorney fee of Ten Thousand Dollars.

The defendants Commonwealth Company and T. I. & I. Company of Tacoma filed separate answers and by stipulation the answer of the Commonwealth Company is to be taken and considered as the answer of the individual defendants Foggs and Gove. The defendants by these answers admit the execution of the pledge by the T. I. & I. Company of Tacoma of its property, the guaranty and mortgage of the Commonwealth Company, and the guaranty of the Foggs and Gove, but deny that there was any valid consideration for the execution of either or any of them.

Defendants as affirmative defenses to the complaint alleged:

(a) That the complaint does not state facts sufficient to constitute a valid cause of action in equity against the defendants, or either of them, nor are the facts stated therein sufficient to entitle plaintiff to any relief against the defendants, or either of them.

(b) That all of said instruments and agreements set forth in the complaint were, and are, illegal and void, and of no force and effect, for the reason that the sole and only consideration for the executing of the same was for the purpose of removing and restraining rivalry and competition in the abstract business in Pierce County, Washington, and were in restraint of trade and competition, and were for the purpose of giving the defendant Commonwealth Company a monopoly of said business.

(c) That the Commonwealth Company was, and is engaged solely in the business of making and selling abstracts of title to lands in Pierce County, and maintaining an abstract plant at Tacoma in said County and

State. That it was not authorized by its articles of incorporation, nor was it engaged in the business of becoming surety or guarantor for any person, firm or corporation for the contracts, undertakings or obligations or third parties. That the guaranty and mortgage or the Commonwealth Company and that of the Foggs and Gove were made and executed wholly without consideration, and said Commonwealth Company neither directly or indirectly received any consideration, or money, or property or labor, or thing of value therefor, or in connection therewith, nor were its assets in any way increased thereby.

The cause was first called up by the attorney for the plaintiff asking the fixing of a trial date. I advised the plaintiff's attorney that I was a lien creditor of one of the individual defendants and therefore considered myself disqualified to try the cause as it might result in the obtaining of a judgment against such defendant which would constitute a lien on the same property upon which I held a lien. Shortly thereafter, and prior to the securing of another judge to try the cause, such individual defendant paid the claim held by me, whereupon I advised the attorney for the plaintiff of the fact of the settlement of such claim, when he again called the cause up for the fixing of a trial date, when I advised him that I considered my disqualification removed by the payment of the debt due me, but if he was of the opinion that the claim having been paid during the pendency of the action affected my eligibility, that he should file an affidavit disqualifying me. This he declined to do, but asked to have the case set down for trial before me.

This cause was tried by the court upon stipulation as to the facts.

T. I. & I. Company, of Washington, a corporation, of which A. D. Willoughby and O. M. Smith and wife were the sole and only stockholders; Commonwealth Company, of which the Foggs and Gove, and executors of the estate of Charles S. Fogg, deceased, were the sole and only stockholders, and Wilson Title & Abstract Company, a corporation, (hereinafter designated as the Wilson Company), in which R. C. Wilson was substantially the sole stockholder, each maintained, owned and operated in the City of Tacoma, an abstract business, used, and intended to be used, for furnishing abstracts of title of property within Pierce County, Washington.

That during all of said time the said companies had carried on business in active and actual competition with each other, and for many years prior to said date said companies owned and controlled the only abstract plants in said County, and transacted all of the abstract business therein.

That the competition between said companies was very keen, and they were cutting prices.

That for some days prior to December 6th, 1909, the Foggs, Willoughby and Smith had been negotiating the sale of the abstract plant of the T. I. & I. Company of Washington to a corporation to be formed.

That during said negotiations, and on the 6th of December, 1909, the Wilson Company executed and delivered to Willoughby, then in the actual management of the T. I. & I. Company of Washington, and Franklin Fogg, then in the management of the Commonwealth

Company, a lease and option to purchase the entire plant and business of the Wilson Company.

That on the 7th day of December, 1909, the said Willoughby by written assignment transferred to said Franklin Fogg his interest in said lease and option to purchase, a copy of which is attached to said lease and option. That by said lease it was provided among other things that said abstract plant should remain in the exclusive possession of the Wilson Company, but should not be operated, and in Paragraph V. it was further provided that said Wilson Company and its officers should not during the life of said lease start, or be interested in any other abstract plant in Pierce County, Washington.

That on the 7th day of December, 1909, the same day that Willoughby assigned his interest in the Wilson lease to Fogg, the T. I. & I. Company of Tacoma was organized, with a capital stock of \$5,000.00 and purchased from the T. I. & I. Company of Washington its abstract plant and business for the sum of One Hundred Thousand Dollars, payable Ten Thousand Dollars in cash, balance of Ninety Thousand Dollars secured by a mortgage upon the plant. Part control in the new company was preserved in the seller and the mortgage given provided that the mortgagor would use its best efforts to enlarge and build up the business. The original stockholders of said T. I. & I. Company of Tacoma were said Willoughby, one A. F. Albertson and F. A. Rice—Willoughby subscribing for forty-eight shares, and the other two for one share each, being the whole of the capital stock—two of the Fogg's indemnified him for his

subscription for such shares. That on said day the said Willoughby assigned his stock in blank and delivered it to Fred S. Fogg, and afterwards on the 30th day of December, 1909, the stock certificates in said T. I. & I. Company of Tacoma were surrendered and the same were duly issued to the Fogg and Gove for all of the capital stock of said company, the par value of which said stock was duly paid by said stockholders to the T. I. & I. Company of Tacoma.

The result of these transactions was to leave the entire abstract business in Pierce County in the hands of the T. I. & I. Company of Tacoma, and the Commonwealth Company, in which two companies the stockholders were substantially the same.

The said mortgage and notes of Ninety Thousand Dollars executed by the T. I. & I. Company of Tacoma to the T. I. & I. Company of Washington for the part purchase of the said abstract plant of the latter company were assigned to the Traders Trust Company of Oregon, an Oregon corporation, and that at all times mentioned in the complaint and answer the said Willoughby and Smith and wife were the officers and sole stockholders of the said Traders Trust Company of Oregon.

The T. I. & I. Company of Tacoma paid to the T. I. & I. Company of Washington the semi-annual interest on its mortgage, due June 7th, 1910, amounting to \$3,150.00, and a like amount on December 7th, 1910, and also paid the installment of principal of Ten Thousand Dollars, due December 7th, 1910. It also paid \$2,800.00, the interest due June 7th, 1911. Said payments amounting in all to \$29,100.00, and on the 7th

day of December, 1911, there would become due an interest payment of \$2,800.00, and an installment of principal of \$5,000.00.

During the summer of 1911 correspondence took place between Horace Fogg, a stockholder in both the Commonwealth Company and the T. I. & I. Company of Tacoma, and Willoughby, looking towards an adjustment of this mortgage indebtedness.

It is clearly shown from these letters and the other evidence that the T. I. & I. Company of Tacoma could not make this payment of interest and principal about to become due, and that some adjustment would have to be made, or the mortgage would be foreclosed and the plant taken back by the Willoughby and Smith interests, or sold under foreclosure sale to some third party and operated as a competing plant.

On said December 2nd, 1911, said Traders Trust Company of Oregon, being then the owner and holder of said notes and chattel mortgage, dated December 7th, 1909, executed by said T. I. & I. Company of Tacoma, and said last named company, executed and delivered to each other the pledge agreement, dated December 2nd, 1911, now sought to be foreclosed, and also the thirty-two notes, to secure which the same was given, all dated December 2nd, 1911, for the principal sum of \$2,500.00 each, making an aggregate sum of Eighty Thousand Dollars, the same being payable one note each year on and after December 7th, 1915, with interest thereon at the rate of 5% per annum, payable semi-annually.

At the same time, on said December 2nd, 1911, and as a part of the same transaction, said Traders Trust Company cancelled and delivered up to the T. I. & I. Company of Tacoma, the notes dated December 7th, 1909, that were executed by said T. I. & I. Company of Tacoma to evidence the deferred payments of the original purchase price of said abstract plant from said T. I. & I. Company of Washington. At the same time on said December 2nd, 1911, said Commonwealth Company executed and delivered to said Traders Trust Company of Oregon its guaranty agreement dated December 2nd, 1911, guaranteeing payment of the first seven of said thirty-two notes, and guaranteeing payment of the interest on all of said thirty-two notes to and including the interest due December 7th, 1921, and also executed and delivered its real estate mortgage to secure said guaranty agreement, and also a certified copy of the resolution of the stockholders and trustees of said Commonwealth Company, dated December 2nd, 1911, authorizing the same.

The undersigned, Fred S. Fogg, Herbert H. Gove, Horace Fogg, and Franklin Fogg, in consideration of the acceptance of the foregoing guaranty and agreement by the said Traders Trust Company of Oregon, and for other valuable considerations, do hereby agree and guarantee to and with the Traders Trust Company of Oregon, that the foregoing guaranty and each and every part thereof, is based upon a valuable consideration, sufficient in law to bind the Commonwealth Title Trust Company, and that the same is a valid and subsisting obligation of said Company. This guaranty by these in-

dividual defendants appears to have been given because of a question having arisen as to the binding effect of the guaranty and mortgage given by the Commonwealth Company.

Within a day or so after December, 1911, said Willoughby and Smith prepared, signed, and delivered an agreement not to enter the abstract business in Pierce County, the agreement being in the following words:

“To the Title Insurance & Investment Company of Tacoma, Washington,

Gentlemen:

In consideration of the agreements which have been this day made between you, the Title Insurance and Investment Company of Washington, the Commonwealth Title Trust Company and the Traders Trust Company of Oregon, we the undersigned individuals, who are the principal stockholders of the Title Insurance and Investment Company of Washington, and also of the Traders Trust Company of Oregon, do hereby covenant and agree that as long as the agreements on your part and on the part of the Commonwealth Title Trust Company and on the part of Fred S. Fogg, Horace Fogg, Franklin Fogg and Herbert H. Gove, are kept and performed, we will not, nor will either of us, directly or indirectly, as individuals, or through the medium of any corporation, transact an abstract business or a title insurance business in Pierce County, State of Washington.

IN WITNESS WHEREOF, We have hereunto set our hand this 2nd day of December, A. D. 1911.

A. D. Willoughby,
O. M. Smith.”

Although it is disputed that this was a part of the other transactions of December 2nd, 1911, the preponderance of the evidence shows that it was, and so understood. The very fact that the agreement was given the same date, to my mind, shows this. The Commonwealth Company never received any money or property, or labor on account of its execution of said guaranty agreement and real estate mortgage. The only benefits derived by it from the agreement being the extinction of competition that had previously existed—from the operating of the abstract plant by the T. I. & I. Company of Tacoma and the elimination of the risk, upon the collapse of the latter Company, of its plant coming into the possession of hostile interests to be operated in actual competition to the Commonwealth Company.

That immediately after said December 2nd, 1911, said abstract plant was shipped to Portland, Oregon, and placed in a vault, one of the keys of which was held by Traders Trust Company, and the other by a representative of that Company and the T. I. & I. Company of Tacoma, and has remained there ever since, all as provided in said agreements of December 2nd, 1911.

That at the time of the making and execution of said agreement of December 2nd, 1911, all of the abstract business in Pierce County was being transacted by the Commonwealth Company and the T. I. & I. Company of Tacoma, except about 10%. Far the major portion of the business transacted by the two companies being transacted by the Commonwealth Company—the 10% mentioned being transacted by a new company entering the field between 1909 and 1911. At the time of trial

the evidence showed that the percentage of business transacted by this new company had materially increased.

In compliance with its said guaranty agreement, dated December 2nd, 1911, said Commonwealth Company duly paid the interest that became due on said thirty-two notes on June 7th, 1912, amounting to \$2,000.00, and also the interest that became due on December 7th, 1912, amounting to \$2,000.00, and also the interest that became due on June 7th, 1913, amounting to \$2,000.00, and the interest that became due on June 7th, 1914, amounting to \$2,000.00 making a total sum of \$10,000.00 paid by it pursuant to its said guaranty agreement dated December 2nd, 1911.

The abstract business in Pierce County continued to slump after December 2nd, 1911, and the Commonwealth Company found before December, 1914, that it could not continue to carry on said guaranty agreement, without great loss to itself, as on said date not only an interest payment of \$2,000.00 was coming due, but also the principal on the first of said thirty-two notes, amounting to \$2,500.00 additional. An effort was made to readjust matters between the defendants and complainants, but without success. This suit was begun upon the failure of such a negotiation.

Frank H. Kelley of Tacoma Washington

John H. Hall of Portland, Ore.

Robert M. Davis of Tacoma, Washington,
Attorneys for Plaintiff.

Bates, Peer & Peterson, of Tacoma Washington
Attorneys for Defendants.

CUSHMAN, District Judge. (After stating facts as above). This general statement is deemed sufficient. Only enough will be added to apply the conclusions reached in order to avoid the saying of more than is necessary, and thereby to escape dictum. The first defense to be considered will be that of the Commonwealth Company. It avers that its guaranty and mortgage securing the payment of a certain part of the principal of the debt of the T. I. & I. Company of Tacoma, and the payment of all the interest on that debt up to 1921, were in violation of the Constitution of the State of Washington, and therefore void. The Constitution of the State of Washington provides:

“Limitations upon issuance of stock.—Corporations shall not issue stock except to bona fide subscribers therefor, or their assignees; nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock, without the consent of the person or persons holding the larger amount in value of the stock, nor without due notice of the proposed increase having been previously given in such manner as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void.”

As no money or property were received by the Commonwealth Company, nor labor done on its account, it is considered obvious that its guaranty and mortgage securing the debt of the T. I. & I. Company, were given in violation of the foregoing provision. They are therefore both void as in violation of a law rather than *ultra vires* for mere want of power. 10 Cyc. 116.

Plaintiff contends that under the *ejusdem generis* rule the words "or other obligations for payment of money," following in the section of word "bond," should be held to mean a bond-like obligation only. If it be assumed that the guaranty and mortgage are not bond-like obligations, yet, in view of the plainly apparent purpose of the provision to protect the creditors and stockholders of the corporation by forbidding its issuance of promises to pay money unless it receive on account thereof, money, property or labor, no necessity appears for invoking the rule of *ejusdem generis* as an aid to interpret this provision. *Kemmerer vs. St. Louis Blast Furnace Company et al.*, 212 Fed. 63; *In re Progressive Wall Paper Corp.*, 229 Fed. 489; *Farmers' Loan & Trust Co. vs. San Diego St. Car Co.*, 45 Fed. 518, 528; *United States vs. Mescall*, 215 U. S. 26; 91 N. E. 242; *The State of Washington vs. Sam Plastino*, 67 Wash. 374, 375. It was the substance of the baseless promise to pay that was aimed at, and not merely its form. Especially should this be the rule in interpreting constitutional provisions which are always to be construed broadly. If this provision does not forbid a guaranty and mortgage, given to secure the debt of another, then it was needless to forbid the issuance of bonds, for an easy way was left open to avoid the prohibition.

The use of the word "issue" in the section, whereby it is made to read "nor shall any corporation issue any bond or other obligation for the payment of money," etc., may show that a formal written obligation was contemplated, and that the ordinary daily dealings of the corporation in carrying on its business was not aimed at. No other limitation is apparent in this regard.

The fact that the stockholders of the T. I. & I. Company of Tacoma, and the Commonwealth Company, though not entirely identical, yet were practically controlled by the same interests, has been considered. Doubtless the Court would, under certain circumstances, look through the cloak of one corporation to the body of another to prevent the consummation of a fraudulent enterprise, but this is not such a case. Mr. Willoughby, the manager of the T. I. & I. Company of Washington, himself helped to organize the T. I. & I. Company of Tacoma, which was to, and did, immediately take over the property in question. He subscribed for 48 of its 50 shares of capital stock. While it was to take over properties valued at \$100,000.00, its capital stock was placed at \$5,000.00, showing a purpose to minimize the liability on the part of those responsible for the corporation. Whether the T. I. & I. Company of Tacoma was created in order that the good will and advantage of a going concern might be continued to better the security which the selling company held upon the plant and business, or whether it was created to help to deceive the public in the idea that there was real competition in the abstract business, when there was none, or whether it was created for both these purposes, which latter seems the more plausible under the evidence, no assistance is afforded the plaintiff in its contention, for thereby the real plaintiffs helped to create this new corporation, whatever its purpose, and equity is not called upon to strip from the body of the Commonwealth Company the cloak in which it is alleged to be hidden, for the advantage of those who fashioned the cloak suitable to, and

probably in part intended for, that purpose. The fact that Willoughby was indemnified by the Fogg's for his subscription to the capital stock of the T. I. & I. Company of Tacoma, shows that he was acting for and with them. Having knowingly elected to deal in this manner, equity is not now called upon to reform the transaction more to their present liking. The Fogg's and Gove executed a guaranty of the guaranty of the Commonwealth Company in the following language:

"The undersigned, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, in consideration of the acceptance of the foregoing guaranty and agreements by the said Traders Trust Company of Oregon, and other valuable considerations do hereby agree and guaranty to and with the said Traders Trust Company that the foregoing guaranty and each and every part thereof, is based upon a valuable consideration sufficient in law to bind the Commonwealth Company, and that the same is a valid and subsisting obligation of said Company."

Having held that the guaranty of the Commonwealth Company was invalid as a direct violation of the constitutional prohibition of the State, above set forth (Article XI, Sec. 6), and not merely *ultra vires*, it follows that the guarantee of these individuals, in contravention of its public policy, is also invalid. Such a prohibition cannot be waived. *Jorguson vs. Apex Gold Mines Company*, 74 Wash. 243; *Smith vs. Alabama Fruit Growers & Wine Association*, 26 So. 232; *Ramsey's Estate vs. Whitebeck*, 56 N. E. 322; *Shane vs. Brandt*, 82 Alt. 551; 32 Cyc. 29; *McMullan vs. Hoffman*, 174 U. S. 639; *Cory vs. Griffen*, 63 N. E. 420.

The defense of the T. I. & I. Company of Tacoma that the suit is premature, in so far as it seeks to foreclose upon the pledged property is concerned, is based upon the following language of the instrument of pledge:

"Time shall be and is of the essence of this agreement and in event of the failure of the first party to pay any of said notes at the time specified in said notes, or to pay any taxes which the first party agrees to pay, and after the continuance of such default for the period of one (1) year, then the whole of said notes shall, at the option of the second party, forthwith and without notice, mature, and the second party shall be entitled forthwith to foreclose said pledge. Defaulted interest shall bear interest at five (5%) per cent per annum from the default until paid.

"PROVIDED, that nothing in this paragraph or in this agreement shall be construed to prevent the second party, at its option, from suing upon any unpaid installment of principal and interest, without waiting for the expiration of one (1) year from the date of default, provided ninety (90) days' notice of such default shall have first been given in writing to the first party or its assigns."

The first of the notes secured by the pledge did not fall due until December 7th, 1915. The failure in the payment of this note would not have continued in effect for one year until the 7th day of next December. This note is in the following form:

"\$2500.00 Tacoma, Wash., December 2d, 1911. •

On or before Dec. 7, 1915 after date, without grace, we promise to pay to the order of The Traders Trust Company, of Oregon, Two thousand five hundred and

no/100 Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin, at the rate of five per cent per annum from date hereof, until paid, for value received, Interest to be paid semi-annually at Tacoma, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof we promise to agree to pay in addition to the costs and disbursements provided by statute a reasonable sumDollars, in like Gold Coin for attorney's fees in said suit or action.

Due Dec. 7, 1915.

At Tacoma, Wash., at
Pacific Nat'l Bank.

The Title Insurance and Investment Co. of Tacoma.

No. 1.

By

H. H. Gove P."

In the foregoing paragraph of the pledge, if the language "any of said notes at the time specified in said notes" refers to the due date inserted in each note, the suit is, in this respect, premature. If the "time specified" means not only such due date but also the date upon which the payee exercises its option to declare the whole amount of the notes due upon failure to pay the sum due and interest upon any note then another question is presented.

It is considered that the former is the true meaning, and that the suit is premature in this respect. Plaintiff's counsel has contended that the scrivener, in drawing the pledge, made a mistake, saying in his brief:

"It is evident, therefore, that from the clause in question, the scrivener omitted in terms to provide that the right of action should accrue for a failure to make payment of the installments of interest, but that such was the scrivener's mistake and not the intent of the parties. It is the rule of interpretation that where such a seeming inconsistency arises the true intent of the parties must be gathered from the construction of all of the writing involved in the transaction."

If there is a discrepancy between the terms of the notes and those of the pledge, the latter should control in this respect, for the instrument of pledge was specially prepared, all the language of which was worked out for this particular situation, while the notes are on printed forms.

The language used seems to contemplate a definite date to be ascertained by an examination of the face of the note, rather than by reference to the extraneous act of the payee by electing to consider it due after default. It would require very clear language to justify the holding that, while the failure to pay the interest on one of these thirty-two notes would directly precipitate the maturity of the principal, it would indirectly cause the whole \$80,000.00 to become due. The language of the note itself "interest to be paid semi-annually at Tacoma, and if not so paid the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note" is not entirely clear. Does that language mean that the whole amount shall become due on the date the option is exercised, or at the date of failure to pay to which the option shall relate back? However much question there might be under the lan-

guage of the notes alone, considering them in connection with the instrument of pledge the first meaning above indicted is the only one compatible with both, for the language of the instrument of pledge shows that the parties intended that the promisor should have a year's grace after the principal of the note became due, before the payee could elect to mature all the notes, but what benefit would the year's grace be if the payee did not know that the principal of the note had been matured by the payee's election.

The letters written by the plaintiff demanding payment of the past due interest, which are many in number, and continued until November, 1915, show that, up to that time, no such election had been made by the payee to mature the principal of any note.

It therefore follows that, whether the language of the instrument of the pledge "the time specified in said note" refers solely to the due date inserted in the note, or not, the attempt here to foreclose the pledge is premature.

The foregoing goes only to the right to foreclose the pledge upon the abstract plant. The defense of invalidity remains to be considered as affecting the notes given by the T. I. & I. Company of Tacoma. The contention of the defense that the contracts of 1911 were monopolistic and in restraint of trade and competition, affects the validity of both the mortgage or pledge, and the notes of the T. I. & I. Company of Tacoma, as well as of the guaranty and mortgage of the Commonwealth Company, and the guarantee of the individual stockholders of the latter. Article XII, Sec. 22, of the Constitution of the State of Washington provides:

“Monopolies and trusts shall never be allowed in this State, and no incorporated company * * * * in this State shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders or the trustees or assignees of such stockholders, or with any co-partnership or association of persons, or in any manner whatever for the purpose of fixing the price or limiting the production, or regulating the transportation of any product or commodity.” * * * *

In so far as the prohibition of this section is concerned it is self-executing, though legislative action may be necessary to provide penalties for its enforcement, or to authorize recovery on account of its violation. *Manson vs. Hunt*, 82 Wash. 291. In this case it will not be necessary to consider what, if any, changes this constitutional provision made in the common law as to monopoly and restraint of trade and competition. The use of the words “any product or commodity” relieves the court from the consideration of the question as to how necessary or useful a product or commodity an abstract of title is.

It has been contended upon the part of the plaintiff that abstracts of title are not products or commodities, but are rather in the nature of personal services. *State vs. Frick et al.*, 169 S. W. 333.

An abstract of title is a written statement of the substance of those public records affecting the title to particular real property. As the evidence shows, such an abstract is the product of skill and labor upon material made effective by means of a “plant.” It is the written history of title to land. It may be preserved indefi-

nately and used in accomplishing the sale and transfer of such land. Abstracts in large cities, down to the point where acreage is platted into additions, are often printed by the hundreds from one copy, and kept in stock. Such a one becomes a commodity of value to many persons in the community not interested in the same parcels of land. The abstract is often used as a pledge or security for money borrowed. While it may be difficult to define the exact meaning of the word "commodity," that it is a word of wide scope is shown by a speech of "The Bastard" in "King John." Articles such as written abstracts of title, produced in the manner indicated, are clearly well within the confines of the word "commodity." Century Dict. Vol. 2, 1132; 8 Cyc. 339.

When the Commonwealth Company came into these transactions the business of the T. I. & I. Company of Tacoma was in a failing condition, the only consideration to the Commonwealth Company being that it gave it a monopoly by excluding both the T. I. & I. Company of Tacoma, and the T. I. & I. Company of Washington, as well as Smith and Willoughby, from the abstract business in Pierce County. In so far as Smith and Willoughby were concerned, they were not theretofore expressly excluded from competing with the Commonwealth Company. If it be conceded that the agreements not to compete were, so far as the T. I. & I. Company was concerned, incidental to the sale, it cannot be so considered when regarding them as transactions with the Commonwealth Company, because that which one company,—The T. I. & I. Company,—got, the other company,—the Commonwealth Company,—did not get.

It by no means follows that because such an arrangement would be considered a lawful incident to the sale of a profitable business, that it would be so considered in the case of a sale of a business which all recognized as running at a loss. In the first instance, the law, in its indulgence, would attribute only lawful motives, unless compelled to do otherwise, but under the latter circumstances, reason cannot but reject the contention. The foundation of the exception to the rule against any restraint of trade and commerce is that the law never presumes wrong to be done, or a wrongful purpose; that a wrongful purpose, and an act to effect such purpose are necessary to defeat a contract between competent parties; that as long as acts are only such as are reasonably necessary to effect a sale of property, an unlawful purpose will not be imputed, although the effect is, in respect to competition, injurious, but the purpose will be presumed to be merely the disposing of his property by the owner, a right of the highest character, not to be lightly impeded. But, if the seller actually enters into the machinations of the buyer, outside of what is reasonably necessary to the sale of his own, and assists thereby in the stifling of competition, or in forming a monopoly, a purpose to injure the public will be attributed to the seller in spite of his right to sell that which is his own.

What incentive or motive was there to buy a business that was running behind, and lock its plant up for 36 years, if it were not to eliminate all competition. If it cannot be fairly said that the obligee's purpose was to buy, how, without a paradox, can it be said, when they were acting in full accord, that the promisor's purpose

was to sell. Under the circumstances it could not be said that the good-will of the business of the T. I. & I. Company of Tacoma was preserved and passed to the Commonwealth Company, because there was no merger in any way of the business of the two companies. They had been kept entirely separate so far as the public was concerned until this arrangement was made, when the former company abruptly terminated its activities, and, so far as the good-will of its business was concerned, it was simply cast adrift.

Under the contract of 1909, possession was immediately taken of the plant by the buyer, subject to partial control on the part of the seller, and competition for the future was eliminated, but under the agreement of 1911, competition was entirely annihilated, and the delivery of possession of the property postponed for 36 years. The limited span of man's life cannot help but affect his interest and purpose in all his actions. The immediate is of more consequence to him than the remote. Under the first contract it might be plausibly contended that the main purpose was to sell, and that the elimination of competition was incident to the sale, but under the latter transaction it is clear, that, the sale of the property, the transfer of possession, being deferred for thirty-six years, two generations, the main, well nigh the entire purpose, was the elimination of competition, and the transfer of the property was merely incidental. Beyond his grandchildren a man is not hardly concerned for making provision for his descendants. It is contended that this was merely a sale, and that while the seller might have knowledge of defendant's purpose to form a

monopoly, yet it was in no sense the seller's purpose, and that, if the seller's act tended to assist in the buyer's purpose, yet it was only such assistance as was necessarily incident to the making of the sale of its property, which it had a right to do. This contention would be more plausible were it not for the fact that, simultaneously with the sale, Mr. Willoughby, manager of the T. I. & I. Company of Washington, assisted the buyers in securing control, by a five year lease and option to purchase, of the only other competing company, the Wilson Company, by the terms of which the lessor was to remain in possession, that is its plant was not to be operated, that is for a monthly rental which was paid to keep it out of business. By assisting in this transaction, the seller departed from what was reasonably necessary in making a sale of its property, and knowingly assisted the buyer in its purpose to effect a monopoly.

It is true that the services of Willoughby in securing the Wilson lease, was no part of the express consideration for the mortgage of 1909. In this sense it is a collateral matter, but in view of all the evidence it is clear that it was all a part of one transaction, and that it was well understood that complete control, that is monopoly, of the abstract business was to be acquired by securing both the independent plants, with the incidental power to fix and control prices and output. *U. S. vs. Addyston Pipe & Steel Company*, 85 Fed. 271.

This is considered sufficient to render the 1909 contract invalid, without considering the effect of the control in the buying corporation retained by the seller, nor the extent of the latter's interest therein, having a \$90,-

000.00 mortgage on property sold for \$100,000.00 to a corporation with a \$5,000.00 capital stock, upon the interest of the seller, or its responsibility for conduct of the buying corporation.

It may be said that it was reasonable for Smith and Willoughby and the selling corporation to contract not to reenter the abstract business in Pierce County, as a part of the sale. If skilled in their calling all the rest of the world remained open to them, and the public would not be likely to suffer from their enforced idleness, but the locking up, for 36 years, of the valuable abstract plant and the abstract books of the T. I. & I. Company of Tacoma, whose only possible use was in the abstract business in Pierce County, deprives the country of a valuable industrial agency in which the public has an undoubted interest. This qualification is recognized by the Supreme Court in *Oregon Steam Navigation Company vs. Winsor*, 87 U. S. 64.

In case of bad market conditions the closing, by agreement, of a plant for a limited time, that is such time as such conditions might reasonably be expected to continue, might not be unlawful, but 36 years is far in excess of any such reasonable time. In *Olin vs. Gilmore*, 25 Fed. 562, where the agreed term was 5 years and the articles not to be manufactured were two kinds of hinges, the agreement was held to be invalid.

Prior to the agreement of December, 1911, in July of that year, one of the Fogg's wrote to Willoughby in part as follows:

"The abstract business is now so poor that some new plan must be made, as there is not enough business to

even pay the running expenses of the two plants, and in addition to that, the new man is coming into active competition and must be headed off before he has a chance to build up a good plant. If you will give us your share of help, we will still try to pull the thing out OK, as almost any revenue derived will be more than could be had by fighting him and each other too. After considering a good many plans, this one seems to be the best.

"That is, to increase the capital stock of our company to four hundred thousand dollars, give you \$80,000 and Wilson \$38,000, preferred stock at 5%, in exchange for your plants, then operate only our plant, and as soon as the amount of work increases any, to cut the rate to seventy-five cents and later to fifty cents, if necessary to keep a clear field. This plant could easily do several times the total abstract business to be done, and we could make more money for us all by operating one plant at reduced rates, than to keep the rates up and let the new man build up a plant out of his profits, and I am sure that low abstract rates will keep out competition better than several companies at higher rates would do. At a dollar, the new man would make a little profit on each order, but at seventy-five cents he would lose a little on each order, and no one outside of ourselves can make abstracts at less than a dollar and make a cent profit. We could do it because our plant is so complete and we have such a large amount of stock on hand."

While the proposition made in this letter was not accomplished in its entirety, it was not rejected on account of the proposition to crush the new competitor by cutting prices. In fact a little later Mr. Willoughby writes Mr. Fogg as follows:

"Your letter of August Third relative to the abstract situation at Tacoma has been received.

“We understand the condition of the abstract business in Tacoma and are ready to give our assistance to any proposition that will relieve the situation, provided our interests are fully protected. Would rather take the plant back and operate it than to go into a proposition whereby we would be a minority stockholder and therefore have nothing to say in the management of the company.”

Later in December the arrangement now in question in this suit, was made. It relieved the defendants of the expense of maintaining two abstract companies, and left them free to suppress this new competitor, as so frankly proposed by Mr. Fogg in his letter to Mr. Willoughby. Although the cutting of prices generally would be of benefit to the public, yet cut-throat competition such as that proposed, and evidently acceded to, for its own benefit, by the plaintiff, the object of which was to eliminate a competitor by selling without regard to a fair profit, for the sole and express purpose of crushing him, to recoup later from the public, is itself unfair competition. *People vs. Dwyer*, 145 N. Y. Supp. 748, affirmed 150 N. Y. App. Div., 542, further affirmed 215 N. Y. 48; *U. S. vs. Great Lakes Towing Company*, 217 Fed. 656, 659, 661; *Report of Comm. of Corp.*, March, 1915—see *Trust Laws and Unfair Competition*, p. 305 et seq., 463 et seq., 479 et seq.

For all of the foregoing reasons it is considered that both the contract of 1909, and those of 1911, are invalid as being unduly and unreasonably in restraint of trade and competition.

If, as has been held under the Sherman Anti-Trust Law, there may be lawfully a reasonable restraint of

trade and commerce, the converse would appear to be that such right carried with it a correlated duty that such restraint should not be unreasonably unrestrained. Such, it is considered, would be a campaign of price cutting such as impliedly agreed to herein, for such would be well calculated in itself, in the end, to unduly restrain trade by driving the men of lesser financial resources, though of equal skill and efficiency, from the field, and, through fear, keeping them from entering it.

Having reached this conclusion, it follows, the pledge of the abstract plant becomes incident to the notes now held to be invalid. The pledge is therefore likewise held to be invalid.

In both the complaint of the plaintiff and the answer of the defendant there is a prayer for general relief in addition to the specific prayer made by each. The Court is warranted in treating such a prayer as for alternative relief and decreeing what equity requires, though it be the specific prayer of neither party.

Ordinarily a court of equity would leave the parties to such invalid contracts in the place where they had placed themselves, and would offer no assistance to either.

16 Cyc. 144 et seq.

16 Cyc. 149 et seq.

In the present case it is to the interest of the public that the abstract plant, at present locked up in such a way as to be inaccessible without the consent of both the plaintiff and the defendant, Commonwealth Company, be restored to active competition. It therefore appears that if the Court adheres to the above rule it will be

assisting in carrying out the monopoly which the parties created. For this reason it is concluded that, in the interest of the public, in the present case this rule should not be followed, but that the abstract plant be restored to the plaintiff. (16 Cyc. 149 notes 7 and 10.) This may be effected by enjoining the trustee holding the second key to the vault in which the abstract plant is kept, from carrying out the illegal trust imposed upon him by the agreement in question. This leaves the plant in the plaintiff's sole custody. The guaranty agreement of the Commonwealth Company contained the following provision:

"The Commonwealth Title Trust Company for the same condition does hereby agree that so long as the abstract plant heretofore and now the property of the Title Insurance & Investment of Tacoma, is held as security for the payment of said indebtedness or any part thereof, it will correctly abstract or cause to be abstracted, all deeds, mortgages or other conveyances, mechanic's liens, and all miscellaneous records, whether herein specifically mentioned or not, affecting the title to real property in Pierce County, Washington, in the same manner and with the same accuracy and dispatch that the same work has heretofore been performed by the Commonwealth Title Trust Company, and cause the same to be arranged according to fee numbers or other system, satisfactory to the Traders Trust Company of Oregon, or its assigns, and cause the same to be bound and properly identified in the customary manner, boxed, wrapped and shipped to the trustees chosen by the Title Insurance & Investment Company of Tacoma, and the Traders Trust Company of Oregon, in accordance with the terms of a certain agreement of pledge made between the Title

Insurance & Investment Company of Tacoma, first party, and the Traders Trust Company of Oregon, second party, of even date herewith, at Portland, Oregon.

PROVIDED, HOWEVER, in consideration of this covenant on the part of the individual guarantors, the said Traders Trust Company of Oregon, its successors and assigns, does hereby waive the right to demand such "take-offs" so long as each and every of the payments of the interest and the principal is made at the times specified in said notes and each of them, or within one year thereafter, and so long as each and every of the covenants on the part of the Title Insurance & Trust Company of Tacoma, in said agreement of pledge of even date herewith, are kept and performed at the times therein agreed; in the event of such default, and its continuance for one year, however, the undersigned agrees that they will forthwith furnish or cause to be furnished to the Traders Trust Company of Oregon, its successors and assigns, all the "take-offs" necessary to complete said plant in the manner hereinbefore specified and thereafter as long as said plant or any part thereof is held as security for such indebtedness, they will keep said plant down to date in such manner."

These "take-offs" would cost \$20,000.00, unless done by the Commonwealth Company, in which case they would cost \$750.00, as in making the "take-offs" for their own plant as it would only be necessary to manifold the work in typewriting. A considerable number of these "take-offs" have been made by the Commonwealth Company, but have not been delivered as agreed. The first installment of interest in default fell due in December, 1914. Suit was begun in February, 1916. The constitutional provision prohibiting the issuance by a corporation of an obligation for the payment of money, unless

for money or property received, or labor done, does not affect this provision of the Commonwealth's guaranty agreement, for the undertaking is not for the payment of money.

Upon first considering this question I was of the opinion that the interest of the public in the restoration of this impounded abstract plant to competition, together with the disparity in the injury wrought the plaintiff by denying the delivery of the "take-offs" as compared with the cost to the plaintiff in making them, was sufficient to justify a decree of their delivery to the plaintiff company, but, upon further consideration, I have concluded that the general rule should be adhered to in this particular, and that equity will leave the parties in the situation in which they have placed themselves. At the time of the arrangement made in 1909 the Commonwealth Company, without any consideration of value to that Company, transferred to the T. I. & I. Company of Tacoma, a considerable number of valuable abstract records, of which, I understand, the Commonwealth Company had two sets. These records were subjected to the mortgage to the T. I. & I. Company of Washington and are, at present, a part of the locked up plant. Under any principle of equity if the "take-offs" were decreed to be delivered by the Commonwealth Company to the plaintiff, the same rule would require the return to the Commonwealth Company of these records parted with by it in 1909, and which are at present a part of the impounded plant. It is therefore considered that in both respects the parties will be left in their present position, such last mentioned records remaining with the remainder of the plant in plaintiff's possession.

Decree will be prepared to embody the foregoing conclusions, neither party to recover cost.

Filed Sept. 28, 1916.

STIPULATION FOR SUBSTITUTION OF PARTY.

Franklin Fogg, one of the defendants in the above entitled cause, having died since the rendition of the final decree herein, and Alva Fogg, his widow, having been appointed as the administratrix of his estate and having qualified as such administratrix, it is stipulated that the said administratrix be substituted for the said decedent as one of the defendants herein.

Dated at Tacoma this 6th day of December, 1916.

FRANK H. KELLEY,

Solicitor for the plaintiff.

CHARLES O. BATES,

NEWTON H. PEER,

CHARLES T. PETERSON,

Solicitors for the defendants.

ORDER.

On reading the foregoing stipulation it is ordered that Alva Fogg, administratrix of the estate of Franklin Fogg, deceased, be and she hereby is substituted as a party defendant in the above entitled cause.

EDWARD E. CUSHMAN,

Judge.

PETITION FOR APPEAL.

Now comes Lumbermen's Trust Company, Trustee, plaintiff in the above entitled cause and, considering itself aggrieved by the final order, judgment and decree of this Court made and entered as of record on October 9, 1916, hereby does appeal from said final order, judgment and decree and from each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and prays that its said appeal be allowed.

The plaintiff presents herewith its Assignments of Error, and its Bond on Appeal in the sum of two hundred fifty (\$250.00) dollars, with good and sufficient security and prays that said sum be fixed as the amount of its said bond on appeal and that its said bond be approved. The plaintiff further prays that transcript of the record, proceedings and papers upon which the said final order, judgment and decree of this Court were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that citation may issue to Title Insurance & Investment Company, Commonwealth Title Trust Company, Horace Fogg, Herbert H. Gove and Alva Fogg, administratrix of the estate of Franklin Fogg, deceased, defendants, in the above entitled cause, to be and appear in said Circuit Court of Appeals on a day certain, as by law provided.

FRANK H. KELLEY,
JOHN H. HALL,
ROBERT M. DAVIS,

Solicitors for Plaintiff.

Service of the within and foregoing, petition for appeal, by receipt of a copy thereof, hereby is acknowledged at Tacoma, this 6th day of December, 1916, and notice of hearing said petition is waived.

BATES, PEER & PETERSON,
Solicitors for Defendants.

ASSIGNMENTS OF ERROR.

Now comes the plaintiff and says that in the record and proceedings of said court and in the final decree therein, there is manifest error, and for error the plaintiff assigns as follows:

I.

The court below erred in holding the agreements of 1909 between the Title Insurance & Investment Company of Tacoma and the Title Insurance & Investment Company of Washington void as in unreasonable restraint of trade and competition.

II.

The court below erred in holding the contracts of 1911 between the Title Insurance & Investment Company of Tacoma and the Traders Trust Company void as in unreasonable restraint of trade and competition.

III.

The court below erred in holding the agreement of Smith and Willoughby and the Title Insurance & Investment Company of Tacoma not to transact an abstract or title insurance business in Pierce County,

Washington, during the life of the agreements between the Title Insurance & Investment Company of Tacoma, the Commonwealth Title Trust Company and The Traders Trust Company, to be for the same consideration and a part of the agreements of 1911 between these parties, and void as in unreasonable restraint of trade.

IV.

The court below erred in holding the contract of 1911 between the Title Insurance & Investment Company of Tacoma and the Traders Trust Company void as in contravention of Art. XII, Sec. 22 of the Constitution of the State of Washington.

V.

The court below erred in holding the agreement of 1911 between the Commonwealth Title Trust Company and the Traders Trust Company, and the mortgage given to secure the obligation of that agreement, void as in contravention of Art. XII, Sec. 6 of the Constitution of the State of Washington.

VI.

The court below erred in holding the individual agreements of the Foggs and Gove, warranting and guaranteeing the validity, binding force and effect of the agreement of the Commonwealth Title Trust Company, were void and unenforceable.

VII.

The court below erred in holding the suit to be premature.

VIII.

The court below erred in dismissing the plaintiff's complaint and entering a decree for the defendants.

IX.

The court below erred in denying to the plaintiff the relief prayed for in the complaint.

Wherefore the plaintiff prays that said decree may be reversed and that said court may be directed to enter a decree in accordance with the prayer of the complaint.

FRANK H. KELLEY,
JOHN H. HALL,
ROBERT M. DAVIS,
Solicitors for Plaintiff.

Copy of the within Assignments of Error received
this 6th day of December, 1916.

BATES, PEER & PETERSON,
Solicitors for Defendants.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That the Lumbermen's Trust Company, a corporation, of Portland, Oregon, as principal, and New Amsterdam Casualty Company, as surety, are held and firmly bound unto Title Insurance & Investment Company, the Commonwealth Title Trust Company, Horace Fogg, Alva Fogg, administratrix of the estate of Franklin Fogg, deceased, Fred Fogg and Herbert H. Gove, in the penal sum of Two Hundred Fifty Dollars (\$250.00), for the payment of which well and truly to be made to the said obligees, we hereby bind ourselves, our successors and assigns, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed, sealed and dated at Portland, Oregon, this 21st day of October, 1916.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT

WHEREAS, the above bounden Lumbermen's Trust Company has appealed to the United States Circuit Court of Appeals for the Ninth Judicial District, from the order and final decree of the District Court of the United States for the Western District of Washington, denying to the said Lumbermen's Trust Company the relief prayed for in its bill of complaint in this cause, which final order and decree was made and entered of record as of October 9, 1916;

NOW, THEREFORE, if the said Lumbermen's Trust Company shall prosecute its said appeal to effect and answer all costs and damages that may be awarded

against it on said appeal, if it fail to make its said appeal good, then this obligation is to be null and void; otherwise to be and remain in full force and virtue.

IN WITNESS WHEREOF, the above bounden principal has caused this instrument to be executed and its corporate seal hereto annexed by F. A. Freeman, Vice-President, and Frank W. Camp, Secretary, officers of the said corporation duly authorized so to do, and the above bounden surety has caused its name and corporate seal to be hereto affixed by W. J. Clemens, Attorney-in-fact, its officers and agents so to do duly authorized, both at Portland, Oregon, the day and year above written.

LUMBERMEN'S TRUST COMPANY,
a corporation,

By F. A. FREEMAN,
(Corporate Seal) Its Vice-President.

By F. W. CAMP,
Its Secretary.

NEW AMSTERDAM CASUALTY COMPANY,
By W. J. CLEMENS,
(Corporate Seal) Attorney-in-fact.

Service of the within and foregoing bond on appeal, by receipt of a copy thereof, hereby is acknowledged at Tacoma, this 6th day of December, 1916.

BATES, PEER & PETERSON,
Attorneys for Appellees.

ORDER GRANTING APPEAL AND FIXING AMOUNT OF BOND ON APPEAL.

The petitioner, Lumbermen's Trust Company, Trustee, plaintiff in the above entitled cause, having heretofore filed its petition for appeal and therewith assignments of error together with its bond in the penal sum of two hundred fifty (\$250.00) dollars conditioned as by law required, and having further given due notice to the defendants above named, of its said petition and its said bond and of the time for presenting the same.

IT IS ORDERED that the said appeal be and the same hereby is allowed to the said petitioner, and the amount of its bond on appeal hereby is fixed as of the sum of two hundred fifty (\$250.00) dollars, and the petitioner's said bond on appeal in said penal sum, with surety therefore, hereby is approved; and

IT FURTHER IS ORDERED that citation issue to the said defendants and each of them, viz.: to Title Insurance & Investment Company, Commonwealth Title Trust Company, Horace Fogg, Fred Fogg, Herbert A. Gove and Alva Fogg, administratrix of the estate of Franklin Fogg, deceased, to be and appear in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, as by law provided.

Done in open court at Tacoma this 6th day of December, 1916.

Exception allowed to the defendants.

EDWARD E. CUSHMAN,

Judge of the District Court of the United States for
the Western District of Washington, Holding
Terms at Tacoma.

Service of the within and foregoing order granting appeal and fixing and approving the bond on appeal by receipt of a copy thereof, hereby is acknowledged at Tacoma this 29th day of December, 1916.

CHARLES O. BATES, of
Solicitors for Defendants.

— IN THE —

District Court of the United States

— FOR THE —

Western District of Washington,
Southern Division.

LUMBERMEN'S TRUST COMPANY,
a corporation, Trustee,

Plaintiff,

vs.

TITLE INSURANCE & INVESTMENT COM-
PANY OF TACOMA, a corporation, COM-
MONWEALTH TITLE TRUST COMPANY,
a corporation, HORACE FOGG, FRANK-
LIN FOGG, FRED S. FOGG and HERBERT
H. GOVE,

Defendants.

NO. 54 E.

JUDGMENT
AND DECREE

This cause having heretofore, and on the 15th and 16th days of June, A. D. 1916, been duly tried and submitted to the Court upon the pleadings and the evidence, the plaintiffs appearing by Frank H. Kelley, Davis & Neal and John Hall, its attorneys, and the defendants appearing by Bates, Peer and Peterson, their attorneys, and the Court having heard the evidence, and the argument of counsel both orally and upon written briefs, and having taken the cause under advisement until the 28th day of September, A. D. 1916, when the Court being fully advised in the premises filed its written opinion in this case;

And now on this day this cause comes on further to be heard upon the motion of Bates, Peer & Peterson, attorneys for defendants, for a judgment and decree in accordance with said written opinion heretofore filed herein, and the Court being fully advised in the premises, and it appearing to the Court that said motion should be sustained,

It is by virtue of the premises, and the Findings and Conclusions in said written opinion filed as aforesaid, by the Court ORDERED, ADJUDGED and DECREED,

I.

The plaintiff, Lumbermen's Trust Company, is a corporation duly organized and existing under the laws of the State of Oregon, having a principal place of business in Portland, Multnomah County, therein, and is a citizen of the said State, and is authorized and empowered by its charter and articles of association to act as a Trustee. The said plaintiff corporation by reorganization and change of name, is the successor to and endowed with all the rights and powers and responsibilities of the Lumbermen's Trust and Savings Bank, a corporation organized and existing under the laws of the State of Oregon, having its principal place of business in Portland, Multnomah County, therein, and a citizen of said State.

II.

The defendant Title Insurance & Investment Company of Tacoma, is a corporation organized and existing under the laws of the State of Washington, having

a principal place of business at Tacoma, Pierce County, therein, and is a citizen of said State, and is authorized by its Articles of Incorporation to engage in the manufacture and sale of all kinds of abstracts of title of real estate, abstract books and other records of the transfer of title of real estate, and to engage in the purchase and sale thereof, and generally to transact any and all business incident thereto.

III.

The defendant Commonwealth Title Trust Company is a corporation organized and existing under the laws of the State of Washington, having a principal place of business at Tacoma, Pierce County, therein, and is a citizen of said State, and is authorized by its Articles of Association to acquire the good will, rights, properties and assets of all kinds of any person, firm or corporation dealing in abstracts of title, or owning an abstract of title plant, and to acquire any and all abstract books, files, records and all property and matters pertaining thereto.

IV.

The defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, each of them, is a citizen of the State of Washington, residing at Tacoma, Pierce County, in said State.

V.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that at all times mentioned in the complaint, and in the answers in this case, one A. D. Wilmoughby and O. M. Smith and Ella M. Smith, his wife,

were officers and sole stockholders of the Traders Trust Company, of Oregon, a corporation mentioned in the pleadings.

That at all times mentioned in the pleadings A. D. Willoughby and Marion Willoughby, his wife, were officers and owners and holders of all of the stock of the Marion Investment Company, a corporation mentioned and referred to in the pleadings.

VI.

That the promissory notes executed and delivered on the 2nd day of December, 1911, by defendant Title Insurance & Investment Company of Tacoma to the Traders Trust Company of Oregon, a corporation duly organized and existing under the laws of the State of Oregon, having its principal place of business at Portland, in said State, and a citizen of said State, in the aggregate sum of Eighty Thousand Dollars, said notes being thirty-two in number, each of said notes being for the principal sum of \$2500.00, as set forth and described in the fifth paragraph of the complaint, together with the mortgage and pledge of personal property given to secure said notes, a copy of which is annexed and attached to the complaint herein marked Exhibit "A," and which said notes and mortgage given to secure the same was by the said Traders Trust Company of Oregon assigned to the Lumbermen's Trust & Savings Bank of Oregon, in trust for the benefit of the said Marion Investment Company and O. M. Smith and Ella M. Smith, his wife, and each of them are invalid as being unduly and unreasonably in restraint of trade

and competition, and as being monopolistic and in contravention of Article XII, Section 22, of the Constitution of the State of Washington, and as being entered into for the purpose of forming a monopoly in the abstract business in Pierce County, Washington, and restraining trade and competition in such business in said County, and in contravention of the public policy of the State of Washington, and the said notes and the said mortgage given to secure the same be, and they are hereby cancelled, annulled and held for naught.

VII.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the contract of guaranty signed on the 2nd day of December, 1911, by the defendant Commonwealth Title Trust Company, and the guaranty of defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, attached thereto and delivered to the Traders Trust Company of Oregon, whereby the said defendant corporation Commonwealth Title Trust Company did guarantee the payment of the first seven of the notes made, executed and delivered by the Title Insurance & Investment Company of Tacoma, as hereinbefore set forth, in accordance with the terms and conditions of said notes, and further guaranteed the payment of the interest down to and including the interest maturing December 7th, 1921, of each and all of the thirty-two notes in accordance with the terms thereof, and whereby the said defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, guaranteed and agreed that the guaranty and agreement of the Commonwealth Title Trust Company, and

each and every part thereof was based upon a valuable consideration sufficient in law to bind the Commonwealth Title Trust Company, and that the same is a valid and subsisting obligation of said company, a copy of which said guaranty in writing is attached to the complaint and made a part thereof, marked "Exhibit B," together with the mortgage executed by the defendant Commonwealth Title Trust Company to the Traders Trust Company, of Oregon, on the 2nd day of December, 1911, to secure said contract of guaranty covering the following described property situate in Pierce County, State of Washington, to-wit:

Beginning at a point on the Northerly side of South 10th Street, City of Tacoma, distant 80.04 feet West-erly of the point of intersection of the Northerly line of South 10th Street with the Westerly line of "A" Street in said City of Tacoma, thence Northerly and parallel with the Westerly line of "A" street, 125 feet; thence at right angles Westerly 19.69 feet; thence at right angles Southerly and parallel with the Westerly line of "A" street 125 feet to the Northerly line of said South 10th Street; thence at right angles Easterly to the place of beginning.

And also a right-of-way in, over and along the following described land situated in the said City of Tacoma, to-wit:

Beginning at a point on the Westerly line of "A" Street formed by the intersection of said Westerly line of "A" street with the Southerly line of Lot 7, Block 902, City of Tacoma; thence Westerly along the Southerly line of Lot 7, 120 feet to the Easterly line of the

alley between said "A" street and Pacific Avenue; thence at right angles Southerly 10 feet; thence at right angles Easterly 120 feet to the Westerly line of "A" street; thence at right angles Northerly 10 feet to the place of beginning; subject, nevertheless, and reserving to the owners of property adjoining the perpetual right-of-way through and along so much of said land last described in conformity with one certain deed from William C. Bardsley and wife, dated April 15th, 1901, and recorded in Book 166, at page 396,

a copy of which said mortgage is attached to the complaint marked Exhibit "C," and made a part thereof, which said mortgage was filed for record in the office of the Auditor of Pierce County, Washington, on December 4th, 1911, at 1:21 P. M., and recorded in Book 178 at page 194 of the Mortgage Records of said County, which said contract of guaranty and the mortgage given to secure the same were assigned and transferred by the Traders Trust Company of Oregon to the plaintiff herein, and each of said instruments, and each and every part thereof, are illegal and void, as being in direct violation of the constitutional prohibition of Article XII, Section 6, of the Constitution of the State of Washington, the said defendant Commonwealth Title Trust Company receiving no money, property or labor done for it in consideration of the execution of said contract of guaranty, and said contract of guaranty constituted a fictitious indebtedness of said Commonwealth Title Trust Co., and as being unduly and unreasonably in restraint of trade and competition and monopolistic, and as being entered into for the purpose of forming a mo-

nopoly in the abstract business in Pierce County, Washington, and restraining trade and competition in such business in said County, and as being in violation of Article XII, Section 22, of the Constitution of the State of Washington, and in contravention of its public policy, and the said contract of guaranty of the Commonwealth Title Trust Company and of the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, and each and every part thereof, and the mortgage given to secure the same be, and the same are hereby decreed to be cancelled, satisfied of record, illegal, unenforceable and void.

VIII.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the mortgage executed by the defendant Title Insurance & Investment Company of Tacoma to the Title Insurance & Investment Company of Washington, on the 7th day of December, 1909, which said mortgage was recorded in the office of the Auditor of Pierce County, Washington, on the 9th day of December, 1909, at 3:07 P. M., at page 429 of Volume 23, of the Records of Chattel Mortgages of said Pierce County, and also filed as a Chattel Mortgage in the office of the Auditor of Pierce County, Washington, fee No. 305,259, together with the notes for Ninety Thousand Dollars, set forth and described in said mortgage, which said mortgage is attached to the answer of the defendant Commonwealth Title Trust Company marked Exhibit 1, be, and each of them are, and were at the time of their execution, and ever since have been, illegal and

void, as being unduly and unreasonably in restraint of trade, and as being monopolistic and in contravention of Article XII, Section 22, of the Constitution of the State of Washington, and as being entered into for the purpose of forming a monopoly in the abstract business in Pierce County, Washington, and restraining trade and competition in such business in said County, and as contrary to the public policy of the State of Washington.

IX.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the agreement entered into by A. D. Willoughby and O. M. Smith, on the 2nd day of December, 1911, whereby the said A. D. Willoughby and O. M. Smith agreed not to enter directly or indirectly in the abstract business in Pierce County, Washington, be cancelled, annulled and set aside, as being in restraint of trade and competition.

X.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the abstract plant described in the mortgage executed by the defendant Title Insurance & Investment Company of Tacoma to the Traders Trust Company of Oregon, which said mortgage is attached to the complaint herein marked "Exhibit A," dated December 4th, 1911, and which plant is now stored in the City of Portland, be, and the same is hereby decreed to be the property of the plaintiff, free and clear of any claim or demands of the defendants, or either of them.

XI.

IT IS FURTHER ORDERED, ADJUDGED
and DECREED that neither party recover costs here-
in.

Done in open Court this 9th day of October, A. D.
1916.

EDWARD E. CUSHMAN,
Judge.

E.E.C.